United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

491

BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23351

MARJORIE WEBSTER JUNIOR COLLEGE, INC., *Appellee*,

v.

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC., *Appellant*.

On Appeal From the Judgment of the United States District Court for the District of Columbia

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* Cases or authorities chiefly relied upon are marked by asterisks.

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*_United States_ v. _American Medical Association_, 130 F. 2d 233 (D.C. Cir. 1942), _aff'd._, 317 U.S. 519 (1943) 46

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JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (7th ed., 1785) 41
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v.

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC., *Appellant*.

On Appeal From the Judgment of the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

STATEMENT OF QUESTIONS PRESENTED

1. Whether higher education, including the evaluation and accreditation of institutions of higher education by a voluntary association of nonprofit and public colleges and universities, is "trade or commerce" within the meaning of section 3 of the Sherman Act?

2. Whether, merely by virtue of its organization as an association, Middle States constitutes a conspiracy or combination in violation of the Sherman Act where Middle States has no intention or capacity to restrain the trade of Webster and has exercised no coercive power to curtail Webster's operations?

3. Whether a restraint of trade can be shown when Webster's profits have steadily increased, when its student body has doubled in size in the last 10 years, and when the very recent decline in its applications for admission closely parallels the decline experienced by every other women's college in the District of Columbia, all members of Middle States?

4. Whether Constitutional restraints are applicable where neither the Federal Government nor the District of Columbia Government participated in any way in Middle States' action with regard to Webster?

5. Whether the distinction made by Middle States between nonprofit colleges and universities as against for-profit corporations engaged in higher education, which is embodied in the nonprofit eligibility criterion, constitutes an unreasonable restraint of trade or is so capricious as to be an invidious discrimination repugnant to the Equal Protection Clause, where Middle States has developed its evaluation and accreditation process in the specific context of the nonprofit institution and the work of Middle States is dependent on a commonly held eleemosynary concept of higher education?

6. Whether Webster, which has enjoyed a 200% increase in its profits from 1961 to 1967 and has suffered no tangible damage attributable to Middle States, is entitled to a permanent mandatory injunction requiring Middle States to change completely its manner of conducting its affairs, with irreparable injury to Middle States?

This case has not been before this Court previously.

REFERENCE TO RULINGS

Reference is made to the Opinion, Findings of Fact and Conclusions of Law made by the United States District Court, Hon. John Lewis Smith, Jr. presiding, on July 23, 1966. *Marjorie Webster Jr. College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*, 302 F. Supp. 459 (D.D.C. 1969).

STATEMENT OF THE CASE

Plaintiff-Appellee Majorie Webster Junior College, Inc. (Webster) is a for-profit, business corporation in the District of Columbia. It is owned and controlled by the members of one family, who hold most of the administrative and corporate offices in the corporation and who are its sole stockholders. Established in 1920 as a school of physical education and expression, Webster was incorporated in 1947 as a junior college for women. It has successfully operated a junior college to the present without evaluation and accreditation by Defendant-Appellant Middle States Association of Colleges and Secondary Schools, Inc. (Middle States).

Middle States was incorporated as a nonprofit educational organization under the New York education law in 1966. Its predecessor, an unincorporated nonprofit association, had been in existence since 1886.

In June, 1966, Webster sought equitable relief—and no damages—against Middle States under Section 3 of the Sherman Act (Count 1) because Middle States refused to consider Webster as eligible for evaluation and accreditation since the latter was not a nonprofit or public institution with a Board of Trustees representing the public interest. Webster subsequently amended its Complaint to add a count claiming that Middle States' eligibility criterion was unjust, arbitrary and unreasonable and that Webster was entitled to equitable relief (Count 2).

After extensive discovery, motions for summary judgment filed by both Webster and Middle States in October, 1968, were denied on December 6, 1968. Trial commenced February 24, 1969, and ended May 5, 1969, with over 7,000 pages of transcript and several hundred exhibits. The entire record has been certified to this Court.

The Trial Court's decision was issued July 23, 1969. Relief was granted to Webster under both counts of the Amended Complaint.

The basic finding of the Court, which affects its entire decision under both counts, is that higher education, in-

cluding accreditation of institutions of higher education, is trade or commerce under Section 3 of the Sherman Act. The Court reached this conclusion by finding, among other things:

1. "*A new and pivotal question here for determination is the applicability of the antitrust laws to the field of education. Is higher education, including the accreditation of institutions, trade or commerce and thus within the regulatory scope of the Sherman Act?* * * *" 302 F. Supp. at 465 (Emphasis added).

2. "*The myriad financial considerations involved in building programs, teachers' salaries, tuitions, and miscellaneous operating expenses attest to the commercialization which necessarily exists in the field of higher education.* Despite the opposition of many educators, there has been a recent trend toward the organization of faculty members to bargain collectively for better salaries and other benefits. Many institutions rent dormitory rooms and operate dining halls, book stores and other service facilities. Also there is a commercial aspect to the sharp competition for government and private contracts and the quest for research grants. In 1967-68 institutions of higher education expended more than 17 billion dollars. The projection for the year 1976-77 is 41 billion. *Higher education in America today possesses many of the attributes of business. To hold otherwise would ignore the obvious and challenge reality.*" 302 F. Supp. at 465-66 (Emphasis added).

3. "* * * Webster is a corporation engaged in business for profit. *Its corporate activity consists of offering educational facilities and services in exchange for the tuition charged students.*" 302 F. Supp. at 466 (Emphasis added).

4. ". . . [M]embership in Middle States results in a special advantage to members of the association over non-members and deprives the non-member of *a significant business service. Accreditation is necessary to engage in effective competition in the field of higher education today.* * * *" 302 F. Supp. at 468-69 (Emphasis added).

5. "* * * The American system of free enterprise is structured on fair and open competition—not monopoly. * * *" 302 F. Supp. at 471.

6. "* * * Lack of regional accreditation harms and inhibits Plaintiff in *its attempt to compete* with institutions which are members of the defendant association and the other regional associations. * * *" 302 F. Supp. at 471 (Emphasis added).

The Trial Court held that no evil intent existed on the part of Middle States, that Middle States was formed with laudable purposes, and that Middle States has "elevated the quality of education." Despite these findings, the formation of Middle States itself constituted a combination, contract and conspiracy in restraint of trade. Because Middle States' members had a "special advantage" which deprived Webster of a "business service" (like a broker denied stock exchange services), a restraint under the Sherman Act was established. 302 F. Supp. at 467, 471.

Middle States' eligibility criterion was judged unreasonable because it did not further its own aim of improving higher education, which, in the Court's subjective opinion and not as a matter of law, needed the benefit of commercial competition and the profit motive. ". . . [D]efendant's requirement that institutions of higher education be nonprofit organizations with a governing board representing the public interest . . . is arbitrary, unreasonable, and contrary to the public interest." 302 F. Supp. at 467-69, 471.

As to Count 2, the Trial Court held that, while precedent in the field was limited, "fundamental fairness dictates that plaintiff is entitled to prevail on count two." 302 F. Supp. at 471. The Trial Court went outside the record and quoted the President of the University of Oklahoma, who did not testifiy at the trial, as saying that:

> "We need the competition of business in education . . . Getting business more heavily into the education field is the best way to guarantee competitiveness and innovation and insure against monopolistic control and exploitation."

On this hearsay basis, without opportunity for cross-examination by Middle States counsel, the Court below concluded that the nonprofit standard is "arbitrary, discriminatory and unreasonable." 302 F. Supp. at 470-71.

A stay of the Court's order was denied by the District Court. On appeal, this Court stayed the order of the District Court to December 22, 1969.

STATEMENT OF FACTS [1]

A. MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC.

1. Middle States Is a Nonprofit, Educational, Voluntary Association.

Middle States is a voluntary, nonprofit, non-stock, educational corporation, organized under the education laws of the State of New York, and incorporated by the Board

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1 Forty-seven witnesses testified at the trial. Twenty-one were called by Webster and twenty-six by Middle States. Portions of twenty-four depositions were introduced. Many of the witnesses were called by the parties as experts in higher education, or as experts in more limited fields.

Middle States called the following expert witnesses: Dr. Arthur M. Blum, President, Point Park College; Dr. John S. Brubacher, Professor of Higher Education, Center for the Study of Higher Education, University of Michigan; Charles H. Burton, Esq., Partner, Ash, Bauersfeld and Burton; Dr. Glenn Christensen, President of Middle States and recently retired Provost and Vice President, Lehigh University, presently Professor of English; Calvin L. Crawford, Administrative Secretary, Middle States Association; Alfred D. Donovan, Vice President, Seton Hall University; Dr. John R. Everett, President, New School for Social Research; Dr. Jesse E. Hobson, President, Heald-Hobson Associates, educational consultants; John C. Hoy, Dean for Special Academic Affairs, Wesleyan University; Sister Elizabeth McCormack, President, Manhattanville College; Dr. Albert E. Meder, Jr., recently retired Vice-Provost, Dean of Rutgers University and recently retired Chairman of the Middle States Higher Commission; Martin D. Robbins, Associate, Heald-Hobson Associates; and Dr. John A. Stoops, Dean of the School of Education, Lehigh University.

Middle States called the following factual witnesses: Miss Mary H. Carter, Principal, Radnor Senior High School, Radnor, Pa.; Sister Margaret Claydon, President, Trinity College; Dr. Dana M. Cotton, Secretary of the Faculty and Director of Placement, Harvard Graduate School of Education, Harvard University; Dr. Wilson Elkins, President, University of Maryland; F. Taylor

of Regents of the University of the State of New York on May 27, 1966. (FF 9).[2]

The membership of Middle States consists primarily of institutions of higher education and secondary education which have been accredited by Middle States. Membership is concomitant with accreditation. (FF 13). The primary goal of each Middle States Commission is to increase the effectiveness of educational institutions. (Jones, JA. 1419; McCormack, JA. 979; Meder, JA. 614).

Middle States' membership of institutions of higher education includes 346 nonprofit institutions (universities, colleges, junior colleges and specialized institutions) in Delaware, Maryland, New Jersey, New York, Pennsylvania, District of Columbia, Puerto Rico and the Canal Zone. Of these, 106 are state or municipal universities, colleges or junior colleges; 83 are private non-sectarian institutions; 137 are private church related or controlled

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Jones, Executive Secretary of the Middle States Higher Commission; Dr. Robert Kirkwood, Associate Executive Secretary of the Middle States Higher Commission; Dr. Moses S. Koch, President, Essex Community College; Dr. John A. Lester, Professor of English, Haverford College; Mrs. John A. Nevius, Director of Admissions, Mount Vernon Jr. College; Sister James Margaret O'Conner, Registrar and Director of Admissions, Immaculata College of Washington; Gordon W. Sweet, Executive Secretary, Commission on Colleges, Southern Association; and Sister Georgina Wilson, Director of Admissions, Dunbarton College of Holy Cross.

Citation is made in this Statement of Facts to the depositions of Sherwood F. Webster, Vice President of Webster, Donald D. Webster, Secretary of Webster, and Miss Frieda Hildenbrand, Director of Admissions of Webster. Reference is also made to the deposition or testimony of the following persons: John E. Armstrong, President, Armstrong College; Miss Catherine Cook, Supervisor of Guidance, Arlington County Public Schools; Lester H. Dye, Director of Admissions, Syracuse University; John Farley, Director of Guidance, Montgomery Blair High School; Richard Klimeck, Counselor and Director of Admissions, Montgomery Jr. College; Robert A. Lowry, Director of Admissions, Slippery Rock State College; and Phillip W. Namy, Assistant Director of Admissions, Thiel College.

In addition, reference is made to the depositions of Dr. Francis H. Herrick, Executive Secretary, Higher Commission of the Western Association, and Dr. Frank Piskor, presently President of St. Lawrence College and Chairman of the Middle States Higher Commission.

2 Findings of Fact of Trial Court (FF).

universities, seminaries or junior colleges; 15 are specialized institutions with concentrated courses of instruction in music, optometry, pharmacy and textiles; one is a special institution for the deaf; three are federally sponsored military academies; and one is a federally sponsored junior college. (FF 14).

Middle States is one of six regional accrediting associations. (FF 16). The other five regional associations are the New England Association of Colleges and Secondary Schools, Inc., the Southern Association of Colleges and Secondary Schools, Inc., the North Central Association of Colleges and Secondary Schools, Inc., the Western Association of Schools and Colleges, and the North Western Association of Secondary and Higher Schools.

The evaluation and accreditation process of Middle States is carried on through two constituent commissions—the Commission on Institutions of Higher Education (established in 1921) and the Commission on Secondary Schools.

Middle States prepares, maintains and issues annually a list of member institutions. A list of member institutions of higher education is issued semi-annually by the Federation of Regional Accrediting Commissions of Higher Education (Federation) and published by the American Council on Education. (FF 21).

2. The Scope of Middle States' Activities Does Not Include Evaluation and Accreditation of Profit-Making Corporations Engaged in Higher Education.

The Middle States Higher Commission does not accredit all post-secondary educational institutions. Its scope of operation is defined by an eligibility criterion which limits the types of institutions which can apply to it for accreditation. These eligibility requirements are not arbitrary limitations. Rather, they have, over many years, grown out of the nature of the Higher Commission's evaluative and accrediting process.

At least since 1928, Middle States has specifically required that, to be eligible for accreditation, an institution

of higher education must be nonprofit with a governing board representing the public interest. (FF 25). At no time in its existence has the Middle States Higher Commission evaluated or accredited a proprietary institution. (FF 25).

The question of whether the scope of the Association should be broadened to include proprietary institutions was one of several membership matters considered by a special committee appointed in 1957 to restudy the membership policies of the Association. The Committee Report recommended against inclusion of proprietary institutions in the membership, because, among other things, "there are certain elements so built in the structure of a proprietary institution as to mitigate against the excellence we seek for accreditation." The Association voted to reaffirm the existing rule with regard to the ineligibility of proprietary institutions. (DX 152, DX 152A; Meder, JA. 663(1), JA. 664, JA. 665).

On March 2, 1964, the Higher Commissions of the six regional accrediting associations established the Federation to represent and speak for the regional higher commissions in matters of common interest, to establish policies and procedures, to exchange information, experience, and personnel, and to cooperate in various ways. (FF 26). On March 4, 1964, the Federation issued a policy statement concerning eligibility for accreditation by the regional associations. (FF 27). Under this policy statement, to be eligible for consideration for accreditation (DX 143):

1. An institution should already have a charter and/or formal authority from the appropriate governmental agency to award a certificate or the associate or higher degree.
2. The institution should be a nonprofit organization with a governing board representing the public interest.
3. Ordinarily it should offer at least two years of higher education at the undergraduate level or at least one year at the graduate level.

4. Normally it should have been in existence long enough to have graduated at least one class.
5. It should require for admission the completion of not less than an appropriate secondary school curriculum or satisfactory evidence of equivalent educational achievement.
6. Its principal educational programs should rest upon a base of liberal studies required of all or most students.

This policy statement represented the pre-existing practice of all of the Higher Commissions except for one limited exception. (Herrick, Dep. JA. 473). The Western Association had accredited three proprietary institutions in a special category set up for specialized institutions. (Herrick, Dep. JA. 474, JA. 486(1)).[3]

In 1965, the Western Association voluntarily abandoned its category for specialized institutions. (Herrick, Dep., JA. 486, JA. 486(1)). Thereafter, the three proprietaries were carried in the general list on the understanding that they would take steps to become nonprofit. (Herrick, Dep., JA. 487). One of these institutions has become nonprofit, and one is in the last steps of the process. (Armstrong, JA. 142). At the meeting of the Federation in March, 1964, the Western Association agreed fully with the eligibility criterion requiring an institution to be nonprofit with a governing board representing the public interest. (Meder, JA. 626).

3. The Nature of a Middle States Evaluation Precludes Evaluation and Accreditation of Profit-Making Corporations Engaged in Higher Education.

Middle States' Higher Commission has been engaged in the evaluation and accreditation of institutions of higher education since 1921. In the early years of its accrediting activity, the Higher Commission applied quantitative standards against which the applicant institution was

[3] The other associations had only a general membership list. No special categories existed.

measured. Easily identifiable factors, such as the degrees held by the faculty and the number of books in the library, predominated in this early form of evaluation. (Brubacher, JA. 1138).

This quantitative approach to accreditation was found to be unsatisfactory. The results of such quantitative measurements often had little relationship to the actual quality of the institution. (Brubacher, JA. 1111).

In 1946 this experience of the Higher Commission resulted in "Characteristics of Excellence"—a document incorporating a new approach to evaluation and accreditation. (Jones, JA. 1414; DX 148). Qualitative standards replaced quantitative standards.[4] The applicant institution today is no longer measured against quantitative minimums. (McCormack, JA. 1003). Rather, it is measured in terms of its own goals and resources. (McCormack, JA. 979; Lester, JA. 1472; Donovan, JA. 1623(1)). The institutions are expected to define their educational goals, utilizing their full resources to that end. In doing so they set the frame of reference within which they are measured.

Accreditation by the Higher Commission does not represent that the institution is operating at or above a minimum level. The Higher Commission does not define what constitutes mere adequacy. Rather,

> "Accreditation indicates that in the Commission's judgment an institution has clearly defined and appro-

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[4] The evaluative criteria of the Higher Commission are contained in a number of documents, "Characteristics of Excellence" being the basic document adopted by the membership of Middle States. From time to time the Higher Commission has adopted other documents. Examples of these are "Middle States Membership and Initial Accreditation" (DX 13A), "Functions of Boards of Trustees in Higher Education" (DX 19 . "Two Year Colleges" (DX 149), "Evaluating the Library" (DX 113), "Conditions and Responsibilities of Employment in Higher Education" (DX 120), "How to Conduct an Institutional Self Evaluation" (DX 160), and "The Master's Degree" (DX 123). Members of evaluating teams sent to examine applicant institutions are provided with copies of these documents. No one of these documents should be read in isolation from the others. They are interrelated. (Donovan, JA. 1619). Together, they describe the evaluative system as it now exists. (Donovan, JA. 1621).

> priate objectives, has established conditions under which it can reasonably be expected to attain them, appears in fact to be attaining them in substantial measure, and should be able to continue to do so." (DX 13B).

Middle States, in evaluating and considering an institution for accreditation, does not compare one institution with another. (Christensen, JA. 873; McCormack, JA. 1016-17; Stoops, JA. 1374(30)). Regional accreditation is not a certification that the academic quality of an institution has reached a certain level. (McCormack, JA. 1016-17). Accredited institutions exist at different levels of the academic spectrum. Each has in common the single purpose of making itself as strong academically as possible. (McCormack, JA. 1016-17). Accreditation by Middle States assures to the public and to the academic community that within the accredited institution there exists a body of self-examining and self-criticizing scholars devoted to the specific commitments of their institution and that the institution devotes all of its resources to educational goals. (Stoops, JA. 1374(29-30)).

Organizational factors vitally affect higher education. (Brubacher, JA. 1120; McCormack, JA. 991). The Higher Commission concluded 40 years ago that the commercial pattern of organization was not conducive to the best kind of work in higher education. (Jones, JA. 1420). The evaluative process subsequently developed by Middle States presupposes the presence of nonprofit or public status, a board of trustees representing the public interest, and devotion of all of the resources of the institution to education. (McCormack, JA. 980).

The primary function of a Board of Trustees in a nonprofit college or university is to establish an environment conducive to learning. (Everett, JA. 1354). The Board of Trustees must see that the total financial resources of the institution are used for academic endeavor. (McCormack, JA. 984). The Board is charged with representing and holding in trust the public interest. (McCor-

mack, JA. 986). Trustees serve without compensation, and usually contribute to and assist in raising funds for the institution. (Everett, JA. 1357; McCormack, JA. 997). Self-aggrandizement of trustees at the expense of the college or university is unconscionable. (Jones, JA. 1427).

Governance in the nonprofit college or university is a shared process. (Blum, JA. 1273). Every component of the college—trustees, administration and faculty—has a decision-making and policy-making role. (McCormack, JA. 982). Decision-making power is diffused throughout the institution. (Jones, JA. 1422-25).

The faculty at the nonprofit college or university are not employees, but rather are appointees. (Brubacher, JA. 1116). The faculty at such an institution should make the final determination as to academic policy. (McCormack, JA. 983).

Profit-making corporations engaged in higher education cannot be evaluated with the standards developed by Middle States because they have a *double* goal—education and profit-making. (McCormack. JA. 1006). The goals of profit and of providing the best possible education utilizing the total resources of the institution are incompatible. (Everett, JA. 1355). What is economically efficient is not necessarily educationally efficacious. Indeed, the two may be at cross purposes. (Blum, JA. 1291). The proprietary institution has a conflict of interest by its very organization and operation. (Jones, JA. 1421; Stoops, JA. 1374(28); Brubacher, JA. 1112-13).

The essential goal of a profit-making corporation is to return profit on an invested capital. Profit is the corporation's prime responsibility. (Everett, JA. 1357). Thus,

> "*If they* [the two goals of profit and education] *are both in the same institution, it is quite obvious that a question of a return on capital must be the first and primary consideration because if the capital leaves the institution, the institution no longer exists for whatever secondary and tertiary function it may*

try to provide and so that a primary profit motive, which all profit organizations must necessarily have to survive, would seem to be to make the educational goal or the educational motive secondary." (Everett, JA. 1355) (Emphasis added).

The organization of the profit-making corporation is critically different from that of the nonprofit college or university. The decision-making structure is simpler. The governing body—the Board of Directors—is elected by and responsible to a body outside the corporation—the owners or stockholders. Their duty is to maximize the return on the capital of the stockholders. They appoint executive management to conduct the day-to-day activities of the corporation, and to carry on its business in the most profitable way possible. Each decision is, and must be, made in terms of the most profitable alternatives for the stockholders. (Blum, JA. 1279).

4. To Apply the Present Process of Evaluation and Accreditation to Profit-Making Corporations Engaged in Higher Education Is Impossible and Would Irreparably Damage That Process.

The Middle States evaluative process has been developed within the context of the nonprofit or public college or university. The evaluative criteria have been developed from the specific point of view that they are to be used in evaluating institutions which devote all their resources to educational objectives. (Donovan, JA. 1623(1)). Middle States evaluates the institution as a whole. Necessarily, considerable emphasis within the evaluative criteria is concerned with institutional governance—the function of the Board of Trustees, the duties of the president and the duties, rights and obligations of the faculty and the students. The Higher Commission's ultimate determinations are made in the light of an institution's own educational goals.

The evaluative criteria developed by Middle States are not suitable to the evaluation and accreditation of profit-making corporations engaged in higher education. The

Middle States approach becomes irrelevant where a critical component of the goal of an institution is not educational, but rather personal gain for the owners. (Brubacher, JA. 118; JA. 1130-32; JA. 1136; JA. 1139; Donovan, JA. 1644).

In order properly to evaluate and accredit a profit-making corporation engaged in higher education, a complete new set of criteria would have to be developed. (Christensen, JA. 880). Furthermore, Middle States would be irreparably damaged if the injunction is enforced. Its voluntary nature as a cooperative membership organization would be destroyed. (Stoops, JA. 1376). The evaluative process developed over the last 50 years would have to be abandoned, and the standards of evaluation and accreditation lowered. (Donovan, JA. 1634; Brubacher, JA. 1126). Admission of profit-making members would require Middle States, in effect, to approve self-aggrandizement on the part of governing boards. (Jones, JA. 1427). It would destroy the principle that an institution must devote all of its financial resources to the support of its educational program. The consequent reduction in the expectations of excellence in academic institutions would have profoundly adverse effects on all education, and thereby on American society and the public interest.

B. MARJORIE WEBSTER JUNIOR COLLEGE, INC.

1. Marjorie Webster Has Successfully Operated a Junior College for Women Since at Least 1947.

The Majorie Webster School of Expression and Physical Education was founded in 1920. In 1927, the school was incorporated for profit under Sec. 599 of the Act of March 3, 1902, presently 29 D.C. Code §§ 601-606 providing for the formation of charitable, educational and religious associations, as corporations for profit.[5] In 1930 the name was changed to Marjorie Webster Schools, Inc. In 1947 the D. C. Board of Education, allegedly pursuant to

[5] It was not incorporated under 29 D. C. Code §§ 401-420, which cover nonprofit institutions of learning with the power to grant degrees.

31 D. C. Code § 120, accredited Webster as a junior college and authorized it to grant the Associate in Arts degree, in spite of the fact that it was not incorporated under 29 D. C. Code §§ 401-420. Thereafter, the name was changed to Marjorie Webster Junior College, Inc.

Webster currently offers two-year terminal and transfer courses. There are seven departments of instruction: Art, Communications (Speech-Drama and Radio-TV), Kindergarten Education, Liberal Arts, Physical Education, Secretarial, and Retail Merchandising. (Stipulation 5). Out of 500 students enrolled in Webster in the academic year 1966-67, 18% of the student body was in the Liberal Arts Department. (Stipulation 5.1, JA. 800). The "basic charge" for resident students at Webster covering room, board, tuition, all athletic activities, and local supervised field trips, was $2,800 in 1967-68 and $2,900 in 1968-69. (Stipulation 30.3, JA. 803).

Webster is one of 35 proprietary institutions of higher education in the United States, which together enroll about 30,000 of the almost seven million students enrolled in the 2,500 American institutions of higher education. (Crawford, JA. 1375(44-45). Webster is one of two proprietary institutions (out of a total of 26 institutions) in the District of Columbia. These two proprietary institutions have about 2,000 students, out of a total of 75,000 college and university students in the District. (DX 157, DX 221).

2. Webster's Activities Have Not Been Restrained by Middle States.

Between 1955-56 and 1966-67 Webster's student body more than doubled from 200 resident students and 25 non-resident students to 470 resident students and 40 non-resident students. (Stipulation 7.1). Opening fall enrollment of first-time freshmen at Webster increased from 155 in 1956 to an all time high of 312 in 1967. (Crawford, JA. 1375(48), DX 222). The number of applicants denied admission by Webster has shown "a steady incline" since 1963 (Hildenbrand Dep., JA. 1047) and has increased

from approximately 100 for the academic year 1960-61 to approximately 200 in 1963-64. This number of rejections has continued annually through 1965-66. (FF 53). Webster does not seek to expand its student body beyond 500 students. (Sherwood F. Webster Dep., JA. 1479(58)). On October 13, 1965, just a few months before this suit was filed, Sherwood F. Webster, Vice President of Webster, reported to the Webster Directors that:

> "The college now had the largest student body (514) in its history. The quality of its students was the highest it has ever been because of a better qualified new faculty, more men teachers, and two deans in their second year." (DX 568, JA. 1072).

Since 1967 Webster has experienced a decline in applications similar to that experienced by the other women's colleges in the District of Columbia. The figures for Webster and the other women's colleges—Trinity College, Dunbarton College, Mount Vernon Jr. College, and Immaculata College—are as follows:

Year	Webster[6]	Mount Vernon[7]	Dunbarton[8]	Trinity[9]	Immaculata[10]
1960		430	420	734	
1961		536	577	732	
1962	658	521	598	643	
1963	568	355	352	584	351
1964	610	444	483	601	432
1965	814	614	453	875	469
1966	775	588	603	870	400
1967	719	568	476	772	364
1968	594	457	414	488	298
1969			337 (as of March 25, 1969)	(not complete)	235 (projected)

[6] Source: Stipulation 30.1. The years in the chart in Stipulation 30.1 are class years. To arrive at year received, 2 years should be subtracted.

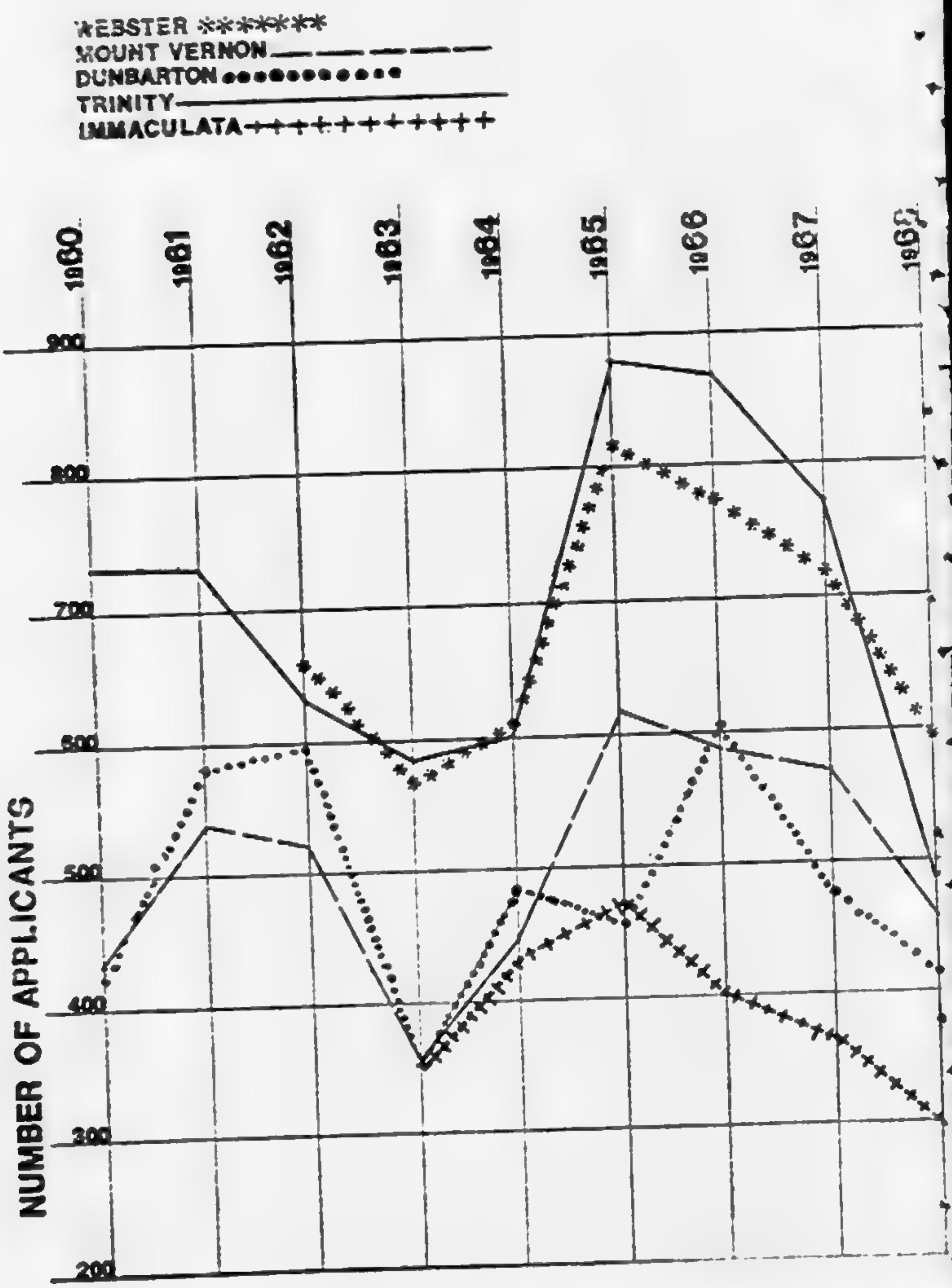
[7] JA. 1025-26.

[8] DX 206, JA. 740-84.

[9] DX 205A, JA. 683.

[10] DX 207, JA. 785-92.

The following chart sets out in graph form the trend in applicants in the five institutions:



All women's institutions in the District of Columbia, except Webster, are accredited by Middle States. 1965 was the year the post-World War II baby boom affected American colleges and universities. (Wilson, JA. 753; O'Conner, JA. 790; Nevius, JA. 1027; Claydon, JA. 686). Women's colleges generally have experienced increasing difficulty in student recruitment because of the rising cost of tuition and increased attendance at co-educational institutions. (Wilson, JA. 754-55; O'Conner, JA. 792; Nevius, JA. 1028-29; Claydon, JA. 686). High school guidance counsellors as well as college admissions officers recognize these trends. (Trotter, JA. 302-03).

Special factors affecting women's colleges in the District of Columbia include the riots in April 1968, (Wilson, JA. 755; O'Conner, JA. 791; Nevius, JA. 1029; Claydon, JA. 687) and the wide national publicity given the crime situation here. (Wilson, JA. 784; O'Conner, JA. 791-92; Nevius, JA. 1029; Claydon, JA. 686). For example, after these riots, Mount Vernon Jr. College had candidates who had accepted the offer for admission but withdrew even though they lost their $300 deposit. (Nevius, JA. 1029).

Webster has suffered no tangible economic harm from its lack of accreditation. Its net operating income has increased by 206.6% between the year ending August 31, 1961, and the eleven months ending July 31, 1967. The eleven months ending July 31, 1967 show a 24.3% increase in net income over the previous year. Thus, the Secretary of Webster testified in answer to the following question (Donald Webster Dep., JA. 1092):

> "Q. Now, speaking generally over the last four or five years, have the profits of the college generally increased?
>
> "A. I think that the trend has been an upward trend, yes, but I might add, by reason of the fact that the student enrollment has increased in size, operational costs have gone up, certainly proportionally."

In the spring of 1967, Webster distributed a 10% bonus to its employees including faculty members. (Sherwood

Webster Dep., JA. 1479(54-55). In the same year, a formal profit-sharing plan was initiated. (Sherwood Webster Dep., JA. 1479(52)).

3. Webster's Recruitment of Students Has Not Been Restrained by Lack of Regional Accreditation But Has Been Hampered by the Inadequacy of Its Recruitment Program and Other Factors Unrelated to Accreditation.

Webster itself states that "[M]any high school counsellors throughout the country recommended Plaintiff to high school students," (JA. 1034(1)) and that "[f]or many years Plaintiff has received letters from educators throughout the country recognizing Plaintiff's academic excellence." (JA. 1034(1)). High school officials testified that their students have been going on to Webster. (Lyle, JA. 178; Carter, JA. 720; Trotter, JA. 300). One high school official told his students that Webster was a "good junior college—one that I could recommend." (Lyle, JA. 175, 176). This witness stated that he pays no attention to the accredited status of a college. (Lyle, JA. 174). Another high school official stated that she had never had any inquiries about regional accreditation from parents. (Carter, JA. 721(1)).

Webster's student recruitment activities consist of the mailing of the college catalogue to various high schools and secondary schools throughout the country, interviewing applicants who come to the college, "sporadic" visits to high schools in the eastern United States by a Vice President who also attends some educational association meetings but is principally engaged in other administrative duties, and the placing of advertisements in less than 10 magazines and newspapers. (Sherwood Webster, JA. 185-87).

Webster does not carry out any recruitment activities in the public high schools in Arlington or Montgomery Counties. (Farley, JA. 329, 330; Cook, JA. 204, 205). One high school in New Jersey which has regularly sent students to Webster has not been visited by a representa-

tive of Webster for at least the last 8 years. (Trotter, JA. 301).

The other women's colleges in the District of Columbia —Trinity, Mount Vernon, Dunbarton, and Immaculata—have admissions staffs varying from two to five people. At least one official at each of the institutions systematically visits high schools around the country, spending most of the time travelling between September and December. Faculty and alumnae participate in recruitment by interviewing students, giving teas, and attending college nights. At three of the institutions, visits are made to the local high schools. (Claydon. JA. 676-682; Nevius, JA. 1022-24; Wilson, JA. 744-49; O'Conner, JA. 786-88). None of these efforts has been made by Webster.

4. Webster Is Operated and Administered Principally for the Economic Benefit of the Webster Family.

The Board of Directors of Webster consists of five members of the Webster family, who also are stockholders of Webster. Except for an eight month period in 1966-67, all of the principal officers and administrative officials at Webster have been members of the family, elected each year by each other. Over $110,000 in salaries is paid out each year to these five persons, and all but one other adult member of the family also are employed by Webster. (Sherwood Webster Dep., JA. 1479(70)).[11] Three of the five officers serve the corporation only in a part-time capacity but draw very substantial salaries. (Donald Webster Dep., JA. 1053; Sherwood Webster Dep., JA. 1479(35), 1479(67-68)).

On May 20, 1966 Dr. Martha Sager, then director of the Biology Department at American University, accepted the invitation of the Webster Board of Directors to serve as President of Webster for one year commencing July 1, 1966, at a salary of $25,000. The contract signed by Dr.

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[11] In late 1967, for example, the retiring Board Chairman, theretofore paid $40,000 per year, became a consultant at $5,000 per year, with an annual pension of $20,000.

Sager provided that she would "assume full powers and responsibilities inherent in the position" of President. (DX 829).

On June 23, 1966, seven days before Dr. Sager was to become President of Webster, the annual stockholders' meeting and the annual board of directors' meeting were held. The stockholders' meeting was attended by G. Fraser Webster and Donald D. Webster. They were joined by Mrs. G. Fraser Webster, David F. Webster and Sherwood Webster for the board meeting which immediately followed. At the stockholders' meeting the bylaws of the corporation were modified to restrict the powers of the office of President and to create the new office of Chairman of the Board, who would be the Chief Executive Officer of the college. (DX 570, JA. 1088). One of the purposes of the change in the bylaws was "to restrict the authority of the President to academic matters." (DX 570; JA. 1088-89). Mr. G. Fraser Webster, up until then President of Webster, was elected to the office of Chairman of the Board at a salary of $40,000.

On February 24, 1967, after approximately eight months in office, Dr. Sager resigned her position as President of Webster. Dr. Sager, in her letter of resignation, stated that individual members of the Board of Directors, all Websters, were actively negating her "full powers and responsibilities inherent in the position" of President. She stated that, in spite of her request for clarification of her powers, she had not received a single official communication from the Board of Directors. She went on to say:

> "Today, after nearly eight months of unremitting efforts to discharge the responsibilities and duties of the Office of President of the College in accordance with the highest tradition of professional educators, I am still denied the full support of individual Members of the Board of Directors, including those Members who are also Officers of my Administration. Clearly, I have now no reasonable choice but to resign." (JA. 1479(104 A-C)).

Since the resignation of Dr. Sager, Webster has not had a President. Since that resignation, Webster has been

operated by an Executive Committee (all Webster family members) and a Special Administrative Committee (with two Webster family members), which purports to carry out the duties of the still vacant position of President.

In 1965-66, Webster paid out $165,743 in salaries to a faculty consisting of 36 persons, some of whom were part-time. The average salary overall was $4603. (Stipulation 31.2, JA. 803). In 1965-66, the median salary for private women's junior colleges faculty was $6,664, and for public women's junior colleges faculty $7,830. (Stipulation 31.1, JA. 803). Webster provides no tenure for any of its faculty members. Each faculty member is retained on a one-year contract by Webster, with the following provision (DX 820):

> "It is understood that the payments hereunder and the contract may be voided at any time during the year in the event of your incapacity to perform your duties, or for other reasons inimical to the welfare of the college; or the contract may be voided should a particular emergency arise, or war conditions justify the same."

Thirty percent of Webster's expenditures go to proprietary status—related items—expenditures which a nonprofit institution would not incur. (Hobson, JA. 1234; DX 215). This means a student only receives 70 cents, out of every dollar of tuition paid, in the form of education. With regard to educational and general expenditures at Webster, 60.2% of expenditures are devoted to administration and general items. Only 28.3% is devoted to instruction, and only 0.4% to library.[12] (DX 215). Included in the ad-

[12] These figures contrast sharply with aggregate percentages for two-year private institutions in the United States. Taking the aggregate of all such institutions, only 29.6% of educational and general expenditure is devoted to administrative and general in contrast to Webster's 60.2%. 42.5% is devoted to instruction as opposed to Webster's 28.3%. 4% is devoted to the library as opposed to Webster's 0.4%. The Mideast region shows 30.7% for administration and general, 44.4% for instruction, and 4.2% for library. (DX 216). This exhibit was erroneously excluded by the Court on the basis that the aggregates contained both nonprofit and profit-making colleges. (JA. 1234).

ministrative and general item are the salaries paid the Webster family. The normal breakdown for educational and general expenses in both two-year and four-year colleges would be 20 to 30% for administration, 45 to 55% for instruction, and 3 to 6% for library. (Hobson, JA. 1253).

5. The Ability of Webster Students To Transfer Their Credits to Senior Institutions Has Greatly Increased—Not Decreased—in Recent Years.

When students transfer from one institution of higher education to another, they usually seek to transfer the credits they have earned. Webster's ability to transfer credits to other institutions of higher education has increased dramatically in the period 1966 to 1968. Webster, in its 1968-69 catalogue, boasts that its graduates "have been accepted with advance standing in approximately two hundred universities throughout the country." (DX 999 at 26. The 1966-67 catalogue states that only one hundred universities had accepted its graduates with advance standing. (DX 1001 at 25).

Policy on acceptance of transfer credits is made by each individual four-year institution which accepts graduates of junior colleges. (Everett, JA. 1374(1)). Middle States sends no statements or directives to its member institutions directing them not to accept transfer credits from nonmember institutions. (Lowry Dep., JA. 510, 511; Namy Dep., JA. 521; Klimek, JA. 322; Dye Dep., JA. 534-35; Koch, JA. 825).

The fact that an institution is regionally accredited by no means guarantees automatic transfer of credit. (Armstrong, JA. 141; Blum, JA. 1293; Trotter, JA. 304). After accreditation, previously unaccredited institutions do not find that there is a dramatic change in their ability to transfer students. (Koch, JA. 816-17).

At a junior college, a transfer program generally consists of a liberal arts course without a specific

major field. (Trotter, JA. 306). About 10 to 20% of credits may normally be disallowed or disregarded in transfer. (Klimek, JA. 324). The most important element in the success or failure in transferring credits is the student's individual record. (Blum, JA. 1292; Cook, JA. 202; Hoy, JA. 1541-42; Carter, JA. 722; Trotter, JA. 305; Meder, JA. 627).

While it is possible that regional accreditation or its lack might affect the decisions of admissions officers on a transfer of credit, a far more important factor is the reputation an institution has built up through the performance of its students at senior institutions. (Hoy, JA. 1324). An institution which had been in existence for forty years, even if unaccredited—such as Webster—would have established a reputation with senior institutions. (Hoy, JA. 1336-37).

Webster produced no substantial evidence at trial that students seeking transfer of credits earned at Webster were denied such transfer because of lack of Middle States' accreditation. Only 34 institutions throughout the United States for the past seven years (1962-69) declined to give full academic credit to Webster students during that period. There are approximately 1700 senior institutions of higher education in the United States.

Within the Middle States area, Webster could only show that eight senior institutions—out of nearly 350 members of Middle States, and 500 institutions of higher education of all types in the area—refused to give full academic credit to Webster graduates. Only six such institutions attributed this rejection to Webster's lack of accreditation. (JA. 172, 512-20, 552-68, 522-29, 569-90; PX 47p). Two others required that a Webster graduate qualify by examination or by one year's residence, the latter being a fairly common requirement for transfer at most senior institutions. (PX 47, 47i-j, 47mm). Out of approximately 1750 institutions constituting the membership of the other regional associations in the United States, Webster could

only show eleven senior institutions which denied transfer credit to Webster credits because of its lack of Middle States accreditation. (PX 47a, 47c, 47h, 47q).

In 1968 Middle States published *The Junior College Transfer*. (DX 100). This publication contains information concerning the policies of a large number of member institutions regarding transfer of credits.

With regard to "non-accredited credits," with 156 colleges reporting, the results were that 75% will accept transfer credits from colleges not regionally accredited. Within this group there are qualifications—45 indicate occasionally, 46 indicate provisionally, 11 specify that the college must be a candidate for accreditation, and 2 indicate that the college must be a Pennsylvania community college. (Crawford, JA. 1378, DX 101).[13]

6. Webster Has Never Applied for Federal Funds and Has a Policy Against Accepting Such Funds.

Webster has never applied for a Federal grant or funds for educational or building purposes, for scholarships or grants to students, for bringing special teachers to the institution, or for its library. (Sherwood Webster Dep., JA. 1479(60). As Webster's Vice President testified:

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13 Surveys such as *The Junior College Transfer* are not necessarily accurate. The number of institutions shown as rejecting non-accredited credits is probably too high. Dean Hoy, formerly Director of Admissions at Swarthmore and at Wesleyan, stated:

> "In higher education there is some kind of a pecking order. There are levels of reputation; there are levels of selectivity. And I think, for example, with respect to surveys like that, often times institutions which are themselves recently accredited, or are not in the highly selective position, may well respond with what they feel is the appropriate public answer to such a question; whereas, a place like Princeton, Swarthmore, the University of Chicago, responds in a far more generous way to the subject question.
>
> "In fact, Princeton, Chicago, Wesleyan, other places might be very severe in terms of the measures of selection that they apply.
>
> "And the other colleges which are saying, 'No' and looking tough, in fact, are quite relaxed in the interpretation of the answers that they supply in such documents." (Hoy, JA. 1343).

> "The college [Webster] has never solicited any funds from its Alumni, nor the parents of the alumni in its 50 year history nor do we solicit or accept funds from the federal government, the state government, local community or any religious groups." (JA. 183).

C. NO CONSPIRACY EXISTS TO RESTRAIN THE TRADE OF WEBSTER.

1. Middle States Has at No Time Been Concerned With Competition From Proprietary Institutions and Never Has Conspired To Restrain Their Trade.

Middle States has never been used by its members to protect their interests against those of nonmember institutions. The Higher Commission has welcomed a large number of new institutions—including a great many community colleges—to its membership. There never has been any resistance to this on the part of member institutions. What Webster would characterize as the "competitive threat" of new institutions never has even been the subject of discussion at any meetings of the Association or the Higher Commission. (Carter, JA. 716). Only educational reasons have caused institutions seeking accreditation to be turned down. (Carter, JA. 716-17).

No conspiracy existed or exists to restrain the trade of proprietary institutions in general or that of Webster in particular. (Elkins, JA. 737; Carter, JA. 712); Lester, JA. 1479; Christensen, JA. 909). Members of Middle States have no fear of a "competitive threat" from proprietary institutions. (Crawford, JA. 459; Lester, JA. 1479; Jones, JA. 1457; Christensen, JA. 905). Any effect that proprietary institutions would have on member institutions was never discussed at any meetings of the Association or the Higher Commission. This situation the Trial Court freely acknowledges:

> "Plaintiff does not contend that the members of Middle States conspired specifically to restrain its trade nor that the six regional associations formed the Federation for that purpose. *The evidence negates the existence of any evil, purposeful plotting by the*

defendant and Webster concedes that the reason for combining was honorable and laudable." 302 F. Supp. at 466 (Emphasis added).

2. Higher Education Is a Cooperative Endeavor, and Middle States Is a Manifestation of the Cooperative, Self-Help Aspect of Higher Education.

Middle States is a manifestation of the cooperative self-help which characterizes higher education. The accrediting process developed by Middle States reflects this concept of mutual assistance. Middle States is a modern expression of the community of scholars. (Stoops, A. 1374(15). The regional accrediting system reflects the responsibility of the academic community for continuing self-evaluation and self-development. (Stoops, JA. 1374(35)).

Thus, Middle States has no phalanx of hired inspectors who rigidly examine an applicant institution. Instead, the Higher and Secondary Commissions depend on teams of volunteers to carry out an evaluation which precedes accreditation and which is made periodically thereafter. Higher Commission team members are drawn from the faculties and administrative staffs of member institutions. The team chairman spends at least 10 to 12 full working days on a single evaluation, yet he receives an honorarium of only $325. (Jones, JA. 1433; Lester, JA. 1465; McCormack, JA. 1005). Other team members receive an honorarium of only $50 for work which includes at least 3 full days at the institution being evaluated.

At present, no difficulty is encountered in recruiting team members because of the prevailing attitude that this form of service is a professional obligation. (Jones, JA. 1433). Educators who have served on evaluation teams question whether the same willing flow of volunteers would exist if an institution to be evaluated was owned and operated by a commercial corporation, the primary objective of which was other than a purely educationl goal. (McCormack, JA. 1005).

The willing cooperation within the academic community serves the public interest and the students by stretching the resources available to higher education. (Everett, JA. 1369-70; McCormack, JA. 1009). Competition, in the sense of rivalry engendered by desire for economic gain, does not exist between institutions of higher education. (McCormack, JA. 1012; Brubacher, JA. 1129). The relation between an applicant institution and Middle States is a cooperative educational relationship. In cooperation, Middle States assists the institution in clarifying and fulfilling its objectives. (McCormack, JA. 1000).

3. Higher Education Does Not Constitute the Sale of Services to Students.

Higher education does not constitute the sale of services to students. (Brubacher, JA. 1119; Everett, JA. 1372). Education is a process that comes about as the result of interaction among students, faculty members, academic administrators, and many others. (Stoops, JA. 1374(27); McCormack, JA. 984). In short, the educational process involves every component of the university or college community working together. (McCormack, JA. 989).

ARGUMENT

SUMMARY

Webster made no showing that it would be irreparably harmed by the continuation of Middle States' policy. Its profits have mounted dramatically. Its student enrollment has doubled in the last ten years. Its students transfer with advance standing to over 200 colleges and universities throughout the United States. Its very recent decline in applicants stems from local conditions adversely affecting all women's colleges in the District of Columbia and from the fact that it is not coeducational.

No basis existed for finding that Webster was threatened with irreparable harm because it could not be evaluated

for accreditation by Middle States. No basis existed for granting a mandatory injunction which would revolutionize the nature of Middle States and compromise the integrity of a highly effective system of encouraging quality in nonprofit and public institutions of higher education.

Higher education, including the accreditation of institutions of higher education,[14] is not within the regulatory scope of the Sherman Act. Higher education, including such accreditation, does not constitute trade or commerce. The subject matter of the Sherman Act is "business competition", and the statute is aimed primarily at combinations having "commercial objectives." Common law restraint of trade precedent does not lend any support whatever to application of the Sherman Act in the instant case. Application of the Act would destroy the existing cooperative relationships among institutions of higher education and impose and enforce between them commercial competition.

Neither Middle States nor other educational associations are Sherman Act conspiracies or combinations merely by virtue of their organization. Middle States has never exercised any coercive power—economic or otherwise—to preclude Webster from participating in higher education. Middle States never has been in any way concerned with the "economic threat" of profit-making corporations engaged in higher education. Its policy of limiting membership to nonprofit institutions with a governing board representing the public interest stems from educational considerations alone.

Middle States' limitation of membership does not constitute an invidious discrimination repugnant to the Constitution. The nonprofit policy is based on rational considerations, including the inapplicability of the evaluative criteria to a profit-making corporation. Further, absolutely no state action was involved in this case.

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14 The Court found accreditation—and thus Middle States—to be a part of higher education. (302 F. Supp. at 465-466).

Webster's inability to prove a combination or conspiracy in restraint of trade constitutes failure to demonstrate "monopoly power" as that term is used in the common law of voluntary associations. Webster's economic success in a period when many colleges are badly in need of funds precludes it from laying a basis for judicial intervention under the common law.

Middle States over the years has developed a process of evaluation and accreditation which measures an institution as a whole against its own objectives and the totality of its resources. This process is completely irrelevant to the business corporation which operates a junior college for profit. Middle States has achieved its influence not through economic power, but through the respect it has engendered through its educational work. That respect will be irreparably compromised if it is forced to apply its evaluative criteria to an entity which, by its very nature, cannot be measured by these criteria.

The Trial Court's decision contravenes existing precedent and the history and nature of higher education as it has existed in the United States and, indeed, in the ancient and modern world abroad. For the first time since 1890, the approximately 2,500 institutions of higher education in the United States—Federal, state, municipal, sectarian, and non-sectarian—have been declared businesses with respect to *all* of their activities. The public interest, as well as the law, requires that the decision be reversed.

Such a reversal can flow from a finding by this Court on Count 1 alone. If higher education is not trade under Count 1, then it is not a business service or economic necessity under Count 2. A finding with respect to the antitrust allegations therefore will warrant a dismissal of the case in all respects.

I. WEBSTER'S FAILURE TO DEMONSTRATE IRREPARABLE HARM PRECLUDES INJUNCTIVE RELIEF IN THIS CASE.

Webster has experienced an overwhelming economic success during the last eight years. Its profits have jumped by over 200%. Its student body has doubled in size. Webster indicates it seeks to expand no further. The number of students it has rejected has doubled. The size of its faculty has doubled. The salaries paid to the Websters have increased dramatically. The corporation has enjoyed such good business that it was able to pay a 10% bonus to all of its employees, including all the adult members of the Webster family except one.

This success took place in the years immediately preceding, and immediately after, this suit was filed. It took place while Webster was operating a far less energetic student recruitment program than other women's colleges in the District of Columbia. (Brief, pp. 24-25, *supra*).

All during this period Webster was not a member of Middle States. Nothing took place during these years which would suggest or indicate that Webster would or will suffer irreparable harm in the future as a result of its lack of membership in Middle States.

Webster's recent decline in student applications is of exactly the same magnitude as that of the other women's colleges in the District of Columbia. Every one of these institutions has suffered a decline in applications. All of them, except Webster, are members of Middle States. The falling off of applications to Webster and the other women's colleges is widely attributed to three factors: (1) the April, 1968 riots in the District; (2) the nationally publicized crime situation here, and (3) a nation-wide decline in interest in exclusively women's colleges—as distinguished from coeducational colleges.

The relief sought by Webster will change radically the nature of Middle States. The enforcement of the injunction will sound the death knell of the voluntary cooperative approach to improving higher education.

Mandatory injunctions are not lightly granted. They are not—and should not be—granted in doubtful cases. *Automatic Radio Mfg. Co. v. Ford Motor Co.*, 272 F. Supp. 744, 749 (D. Mass. 1967), *aff'd.*, 390 F. 2d 113 (1st Cir. 1968), *cert. denied*, 391 U.S. 914 (1968) (Motion for preliminary injunction denied in antitrust suit where no causal relationship between plaintiff's harm and defendant's action was shown). See *Clune v. Publishers' Ass'n of New York City*, 214 F. Supp. 520, 531 (S.D.N.Y. 1963), *aff'd*, 314 F. 2d 343 (2d Cir. 1963); ("mandatory injunctions . . . are not granted unless extreme or very serious damage will result and are not issued in doubtful cases").

The Trial Court's findings with regard to irreparable harm are conclusory. No factual basis exists to support the findings. Indeed, the fact of Webster's continually increasing profits points the other way. This Court should reverse and deny Webster relief on the ground that it has completely failed to show that it will be irreparably harmed by the continuation of Middle States' requirement that an institution be nonprofit with a governing board representing the public interest in order to be eligible for Middle States accreditation.

II. THE SHERMAN ACT IS NOT APPLICABLE.

The Sherman Act is concerned with the concentration of significant economic power in the hands of private individuals to a degree that such individuals have the power to control the economic terms of trade within a particular market. Sections 1 and 3 of the Sherman Act make it illegal to exercise coercive economic power to restrain or eliminate competition in a particular market.

The activities in which Middle States is engaged are not economic. The activities are not trade or commerce. Middle States is not a combination of capital formed for the purpose of increasing the return on capital. It is a cooperative, self-improvement group formed by institutions with a common interest in raising educational standards.

Its influence stems from educational factors, which are outside the economic arena.

The Sherman Act is a wholly inappropriate instrument for regulating higher education. Violations of the statute can be prosecuted as crimes. In civil actions, treble damages can be awarded. An injunction requiring radical changes in the manner a defendant operates can be granted. The Act seeks to assure that, within American industry, contending forces engendered by the desire for profit will operate freely.

The Sherman Act never was intended to regulate higher education. In industry, free competition for a commercial market, motivated by desire for profit, is deemed to be the soundest method for assuring maximum production. The forces which tend to produce the highest quality in education are entirely different from the forces which tend to produce the best automobiles or television sets. In education, the highest achievements have been obtained by the cooperative search for improvements and mutual assistance between institutions. This system—the academic system—would be gravely threatened if every association could be characterized as a conspiracy and every self-improvement organization as a combination in restraint of trade.

Webster is unable to cite a single case in which the Sherman Act was invoked to regulate higher education. The Trial Court's decision is supported by neither precedent nor legal reason.

A. Congress Did Not Intend the Sherman Act to Regulate Higher Education.

1. The Supreme Court, Fulfilling Congressional Intent, Has Confined the Sherman Act to Commercial Activity.

Because of the breadth of the language used in the operative sections of the Sherman Act, the Supreme Court has placed heavy dependence on the legislative history of the Act to determine Congressional intent.[15] This is partic-

[15] The legislative history is summarized in 1 TOULMIN, ANTI TRUST LAWS, § 1.3 *et seq.* (1949).

ularly so where the scope of the Act's application is in question, as in the instant case.

The Sherman Antitrust Act, enacted in 1890, was designed to break up the large trusts and other combinations which were being formed in American industry during the period of rapid growth and prosperity following the Civil War. The Supreme Court in *Standard Oil Co.* v. *United States*, 221 U.S. 1, 50 (1911), cited the Congressional debates to supply the background events which led to the enactment of antitrust laws and the evils which such laws were intended to suppress.

> "The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it, *to fix the price* and thereby injure the public; (2) The power which it engendered of enabling *a limitation on production;* and, (3) The danger of *deterioration in quality* of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale." 221 U.S. at 52 (Emphasis added).

With regard to the background against which the Act was passed, the Supreme Court in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 492-493 (1940), stated:

> "[The Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition *in business and commercial transactions* which tended *to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services*, all of which had come to be regarded as a special form of public injury." (Emphasis added).

In *Apex*, the Supreme Court recognized that "*business competition*" was what the Sherman Act was designed to assure. 310 U.S. at 493, fn. 15. More recently, the Court stated in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213, fn. 7 (1959) that:

> "The Court in Apex recognized that the Act is aimed primarily at combinations *having commercial objectives* and is applied only to a very limited extent to organizations, like labor unions, *which normally have other objectives*." (Emphasis added).

Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), involved an alleged "combination" which did not have a commercial purpose. The plaintiffs alleged that the railroads had engaged a public relations firm to wage a publicity campaign against the truckers. The purpose of the campaign was to create an atmosphere conducive to the adoption and retention of laws and law enforcement practices destructive to the trucking industry. The truckers alleged a conspiracy in violation of the Sherman Act and sought treble damages. Justice Black, speaking for the Court, rejected this contention on the ground that the combination complained of constituted political activity and was outside the reach of the antitrust laws. The Court stated that, to accept the truckers' position

> ". . . would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." 365 U.S. at 137.

The Court continued:

> "The proscriptions of the Act, *tailored as they are for the business world*, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation.

All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." 365 U.S. at 141 (Emphasis added).

2. The Manifest Intent of Congress Is Clearly Inconsistent With Application of the Sherman Act to Higher Education.

The Court in *Noerr* gave consideration to countervailing Congressional policies—Congressional caution in legislating with respect to political conduct. Congress has demonstrated an analogous caution in the regulation of educational standards, an area traditionally left to the states or voluntary associations. This policy of caution would be negated if the Sherman Act, through judicial fiat, is extended to the regulation of education.

The National Defense Education Act, 20 U.S.C. § 401 and § 402 (1958) codified this national policy:[16]

> "The Congress reaffirms the principle and declares that the States and local communities have and must retain control over and primary responsibility for public education." 20 U.S.C. § 401.
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> * * *
>
> "Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system." 20 U.S.C. § 402.

More significantly, Congress has sanctioned the cooperative combination of educational institutions for mutual benefit. In the Higher Education Amendments of 1968, amending the Higher Education Act of 1965, P.L. 89-329

[16] See, to the same effect, 20 U.S.C. § 402, 20 U.S.C. § 35, 20 U.S.C. § 242(a), 20 U.S.C. § 757, 20 U.S.C. § 884, 20 U.S.C. § 1144(a), and 20 U.S.C. § 1211.

(PX 123). Congress, in Section 1201(j), 20 U.S.C. § 1141 (j), defined the term "combination of institutions of higher education" as

> "... a group of institutions of higher education that have entered into a cooperative arrangement for the purpose of carrying out a common objective, or a public or private nonprofit agency, organization, or institution designated or created by a group of institutions of higher education for the purpose of carrying out a common objective on their behalf."

Thus, Congress has explicitly recognized the legitimacy and value of combination in higher education. It would be strange indeed if Congress intended such combinations to constitute violations of the Sherman Act, which is precisely what Webster contends and what the Trial Court held.

B. The District Court Erred in Its Holding That Higher Education Constitutes Trade or Commerce.

Webster has sought to disown the Trial Court's holding that higher education is "trade or commerce" (Opposition to Motion for Stay, pp. 14-15) because it recognizes the novel and controversial nature of the Court's finding. Webster cannot escape the clear language of the Opinion. (Brief, pp. 4-5, *supra*).

The Trial Court used certain peripheral aspects of higher education to conclude that the overall nature of this highly complex and ancient activity is trade or commerce. These peripheral aspects—the operation of dining halls, dormitories and bookstores, and the financial considerations involved in teachers' salaries and administrative expenses—have no relevance whatever to this case. Webster never has maintained that the "trade" of its bookstore is restrained. The Court utilized some peripheral aspects of higher education to characterize teaching, research, and scholarship within liberal arts-based institutions as "trade or commerce," and by clear implication held that

students in such institutions are articles of trade or commercial customers.[17]

In addition to holding that higher education is trade or commerce, the Trial Court sought to buttress this precedent-lacking conclusion by claiming that Webster, as plaintiff, was engaged in trade or commerce. The Trial Court based this subsidiary finding on one fact—that Webster was a profit-making corporation. Instead of dealing with the core of this subsidiary issue—whether carrying on a junior college constitutes trade or commerce—the Court applied an artificial and mechanical rule determining "trade or commerce" not on the basis of the activity involved, but on the happenstance of Webster's corporate form.

The Supreme Court has made clear that, in determining whether an entity is engaged in trade or commerce, attention is not focused on the corporate form, but rather on the activity engaged in. *American Medical Association* v. *United States*, 317 U.S. 519, 528 (1943). The Supreme Court there rejected the argument that, because the Group Health Association was nonprofit, it could not be engaged in "trade or commerce."[18] Application of the Sherman

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17 With all due respect to the Trial Court, the rationalization set forth in this finding could best be described as the fallacy of converse accident or hasty generalization. The Trial Court considers only the "accidental" or non-intrinsic aspects of higher education and generalizes on these. By analogy, it might just as well be argued that raising a family is a commercial venture since there are many commercial aspects to it. See COPI, INTRODUCTION TO LOGIC 68 (3d ed. 1968).

18 The Supreme Court in *American Medical Association* v. *United States*, *supra*, held that the character of GHA's corporate charter did not determine the issue of whether or not GHA was engaged in business or trade:

> "The fact that it is co-operative, and procures services and facilities on behalf of its members only, does not remove *its activities* from the sphere of business." 317 U.S. at 528 (Emphasis added).

The footnote to this statement states:

> "Compare *Associated Press* v. *Labor Board*, 301 U.S. 103, 128-129; *In re Duty on Estate of Incorporated Council*, 22 Q.B. 279, 293; *Maryland & Virginia Milk Producers' Association* v. *District of Columbia*, 73 App.

Act to regulate a field of endeavor should not depend on happenstance—the presence or absence of a profit-making entity. Webster is licensed as a junior college. The inquiry is whether higher education—the essential activity engaged in by Webster and by Middle States and the activity to be regulated by the Act if it is applied—is "trade or commerce."

If the Trial Court's capricious test is adopted, then one profit-making corporation in any field could bring that field within the scope of the Act. For example, one profit-making church could subject the entire field of religion to the Sherman Act, just, as under the District Court's decision, one profit-making junior college subjects the field of higher education to the Sherman Act. Further, the test advocated by Webster gives profit-making entities a privileged position in any field they enter. They, but not their nonprofit neighbors, can invoke the Sherman Act.

1. The Controlling Definition of "Trade" Excludes Higher Education.

In *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427 (1932), the issue was whether cleaning, dyeing, and otherwise renovating clothes constituted trade or commerce within the meaning of Section 3 of the Sherman Act. Affirming the Supreme Court of the District of Columbia, the U.S. Supreme Court held that these activities did constitute trade or commerce within the meaning of Section 3.

As to the meaning of the word "trade," the Court relied on the decision of Justice Story in *The Nymph* (C. C.) 1 Sumn., 516, 18 Fed. Cas. 506 (No. 10388, 1834). 286 U.S. at 435-36. Justice Story, in construing use of the term "trade" in the Coasting and Fishery Act of 1793, made the

D.C. 399, 119 F. 2d 787, 790; *La Belle v. Hennepin County Bar Assn.,* 206 Minn. 290, 294; 288 N.W. 788, 790."

In each of these cases, the Courts examined the nature of the activity carried on and, on this basis, determined whether the party was in trade. The Courts did not look at the charter of the corporation to see whether or not it was incorporated for profit.

following statement which was quoted by the Court in *Atlantic Cleaners & Dyers:*

> " 'Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, *not in the liberal arts or in the learned professions,* it is constantly called a *trade.*' " 286 U.S. at 436 (Emphasis added).[19]

In excluding the liberal arts from the definition of trade, the Supreme Court clearly precluded application of the Sherman Act in the instant case.

In 1950 the Supreme Court again applied the *Nymph* standard in *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950). The sole inquiry was whether the business of a real estate broker was "trade" within the meaning of Section 3 of the Sherman Act. Justice Douglas, on behalf of the Court, stated that the activity of the defendants was "commercial." The Court stated:

> "Their activity is commercial and carried on for profit. . . *The competitive standards which the Act sought to preserve in the field of trade and commerce seem as relevant to the brokerage business as to other branches of commercial activity.*" 339 U.S. at 492 (Emphasis added).

The Court then applied the *Nymph* standard and concluded that the business of a real estate broker constituted "trade" within the meaning of Section 3.

The holdings of *Atlantic Cleaners* and *National Association of Real Estate Boards*, both applying the *Nymph* formula, definitely preclude application of the antitrust laws to the professions or the liberal arts.[20] Further, a funda-

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[19] Justice Story employed Samuel Johnson's definition of trade: "Occupation; particular employment, whether manual or mercantile, distinguished from the liberal arts or learned professions." JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (7th Ed., 1785).

[20] The Trial Court erroneously stated that Middle States claimed that it was outside the scope of the Sherman Act by virtue of the learned profession exemption. Middle States, on the contrary, claimed the "liberal arts" exemption.

mental test is set up by *National Association of Real Estate Boards*: (1) whether the activity is commercial, and (2) whether the competitive standards embodied in the Sherman Act are relevant to the activity in question.

2. Higher Education Is Not a Commercial Activity.

National Association of Real Estate Boards, supra, requires that an "activity" be commercial before the antitrust laws can be applied to regulate that activity.

That higher education is not a commercial activity is universally recognized. Education is a public service.[21] Higher educational institutions are maintained, not for profit, but for the public. As this Court said in *U. S. ex rel. Chicago Business College v. Payne*, 20 App. D.C. 606 (1902):

> "The lower education, when it is not given by the State, or through some public agency, or by some religious organization as a matter of benevolence, is usually left to individuals to be conducted as a business; while instruction in the higher branches of human knowledge is generally disseminated through those institutions of learning, popularly known as such, which owe their origin to private or public munificence and are *established solely for the public good and not for private gain*." 20 App. D.C. at 613 (Emphasis added).

This decision, like many others, is in fundamental accord with the exclusion of the "liberal arts" from trade by the definition embodied in the *Nymph* standard.[22]

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21 "Just as the distinctive things about man, which separates him from other gregarious animals, is his capacity for reasoned thought, so the university's basic commitment to thought distinguishes it essentially from most other institutions. **It does not seek victories; it does not work for profits;** its production is not measurable. Its truest goals are not precise targets, but high ideals—the enrichment of the minds and lives of its students, the advancement of knowledge, the increase of understanding among men, and the unending search for truth." Goheen, *The Human Nature of a University*, UNIVERSITY: A PRINCETON QUARTERLY, No. 42, Fall, 1969 at 4.

22 Among such other cases recognizing the essentially non-commercial nature of education are *Cornell University v. Messing Bakeries*, 138 N.Y.S. 2d 280, 282 (App. Div. 1955), *aff'd*, 309 N.Y. 722, 128 N.E. 2d 421 (1955) (injunction granted to prevent bakery from using University's name: "Equity may also shield the thrust by business into the kind of legal rights acquired in *areas entirely removed from commercial activities*") (**Emphasis added**);

C. The Competitive Standards Embodied in the Sherman Act Are Irrelevant to Higher Education.

The Court in *National Association of Real Estate Boards, supra,* specifically found that the competitive standards of the Sherman Act were relevant to the business of real estate brokers. Such a finding could not be made in the instant case.

Since the early days of the Sherman Act, the Supreme Court has recognized that the end sought to be achieved by the statute was effective competition among economic units. In *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931), the Court approved an earlier statement in *FTC* v. *Sinclair Refining Co.*, 261 U.S. 463, 476 (1923), which said:

> " 'The great purpose of both statutes [the Sherman Act and the Federal Trade Commission Act] was to advance the public interest by securing fair opportunity *for the play of the contending forces ordinarily engendered by an honest desire for gain.*' " 283 U.S. at 647 (Emphasis added).

And the Court squarely held that the protection afforded by both statutes

> ". . . presupposes the existence of some substantial competition to be affected." 283 U.S. at 648.

See also *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958) (". . . the policy unequivocally laid down by the [Sherman] Act is competition").

Given this goal of competition between contending economic units sought to be attained by the antitrust laws, it is clear that the entire regulatory scheme is wholly foreign to higher education. This is so because the relationship among colleges is cooperative, not competitive.

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and *Beard* v. *Board of Education*, 81 Utah 51, 16 P. 2d 900, 910 (1932) (permanent injunction denied because no violation of state statute prohibiting use of school houses for commercial purposes; extracurricular activities of school "are a proper and necessary part of our educational system, and *hence cannot be considered as carried on for commercial purposes.*") (Emphasis added). *Cf. Marston* v. *Ann Arbor Property Managers Ass'n.*, 1969 CCH *Trade Cases* ¶ 72,862 at p. 87,235 (E.D. Mich. 1969) (". . . [T]here is presently no way that plaintiffs, as individuals or students, may come within the definition of 'interstate commerce.' ")

Higher education is distinguished by programs for the exchange of professors, the interchange of students who wish courses for credit at other institutions, and the general pooling of resources. Such cooperative endeavors are not a hallmark of business competition. Thus, to apply the Sherman Act in the instant case is to impose alien concepts on higher education. Imposition of the Sherman Act would render illegal much of the cooperation which presently exists between colleges.[23]

The Sherman Act's purpose is to *preserve* the competitive relationship between business entities. The Act is not intended to *impose* competition as the fundamental relationship among institutions which never have before economically competed with each other.

D. The Reach of the Sherman Act Is Consonant With the Reach of the Restraint of Trade Doctrine at Common Law.

1. The Sherman Act Was Intended to Codify the Common Law on Restraint of Trade.

The legislative history of the statute established a fundamental proposition. The Sherman Act was intended to provide, on a national basis, a remedy dealt with on a state-wide basis by the common law. The Act codified the principles of the common law with regard to restraint of trade. Whether a particular activity is within the scope of the Sherman Act must be determined by whether or not common law restraint of trade concepts can be applied to the activity. Thus, Senator Sherman, in describing the bill, stated:

> "It [the bill] does not announce a new principle of law, but applies old and *well-recognized principles of the common law* to the complicated jurisdiction of our State and Federal Government. Similar contracts in any State in the Union are now, by common or statute law, null and void. Each state can and does prevent and control combinations within the limit of the State."

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23 Congress has consistently encouraged cooperation among institutions of higher education. Thus, in the Higher Education Act of 1965, Section 304(a), Congress provides for grants for cooperative arrangements to strengthen developing institutions. 20 U.S.C. § 1054.

21 Cong. Rec. 2456, cited in 1 TOULMIN, *supra*. at 7 (Emphasis added).

Senator Sherman, in debates, also discussed in detail certain state Court common law restraint of trade cases, the deciding principle of which the Senator sought to have enacted into national law. Cf. *Apex Hosiery Co.* v. *Leader, supra,* 310 U.S. at 497, fn. 17. Thus, Senator Sherman cited *Richardson* v. *Buhl,* 77 Mich. 632, 43 N.W. 1102 (1889), a leading case decided by the Supreme Court of Michigan. The Court there held that a contract to enforce a monopoly in the manufacture of matches was illegal as a restraint of trade. The Diamond Match Co., according to the Court, was organized for the purpose of aggregating

> "an enormous amount of capital, sufficient to buy up and absorb all of that kind of business done in the United States and Canada, to prevent any other person or corporation from engaging in or carrying on the same, thereby preventing all competition in the sale of the article manufactured . . . *The sole object of the corporation is to make money, by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure.*" 43 N.W. at 1110. (Emphasis added).

Senator Sherman placed emphasis upon *People* v. *North River Sugar Refining Company,* 3 N.Y. Supp. 401 (Cir. Ct. 1889), *aff'd.,* 7 N.Y. Supp. 406 (Sup. Ct. 1889), *aff'd.,* 121 N.Y. 582, 24 N.E. 834 (1890). This was the leading case in which the common law was used as a basis for declaring a trust illegal. Senator Sherman cited the opinion of Justice Barrett, 3 N.Y. Supp. 401, which reviewed the common law on the subject.

> "But all the cases, ancient and modern, agree that a combination, *the tendency of which is to prevent general competition and to control prices,* is detrimental to the public, and consequently unlawful . . . Judge Daly sums up the result of his examination of the cases in these words: 'That combinations are unlawful, the design and effect of which necessarily is to give the party combining a monopoly, more or less, for any length of time, of the manufacture or sale of a commodity, * * * or to regulate and control the price of

> a commodity, * * * or to secure any pecuniary advantage in restraint of trade which would be injurious to the community.'" 3 N.Y. Supp. at 409 (Emphasis added).

Justice Barrett cited six cases on this point.[24] All of these involve a traditionally commercial activity and a restraint or monopoly entered into for the purpose of pecuniary gain. Not one applies the common law doctrine against monopolies or restraints of trade to activities that are not commerical, or profit oriented. The same is true of other cases discussed by Senator Sherman.

2. The Common Law Test Was the Standard on Which the AMA Case Was Decided by This Circuit.

The opinions of this Court of Appeals in *United States v. American Medical Ass'n.*, 110 F. 2d 703 (D.C. Cir. 1940), *cert. denied*, 310 U.S. 644 (1940) and 130 F. 2d 233 (D.C. Cir. 1942), *aff'd.*, 317 U.S. 519 (1943), rest on the applicability of restraint of trade concepts to the practice of medicine. Thus, Justice Miller in the second Court of Appeals decision sustaining the conviction of the defendants, stated:

> "It may be regrettable *that Congress chose to take over in the Sherman Act the common law concept of trade*, at least to the extent of including therein the practice of medicine. Developments which have taken place during recent decades in the building up of standards of professional education and licensure, together with self-imposed standards of discipline and professional ethics, have, in the belief of many persons, resulted in substantial differences between professional practices and the generally accepted methods of trade and business." 130 F. 2d at 236 (Emphasis added).

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[24] *Hooker v. Vandewater*, 4 Denio 349 (N.Y. 1848); *Stanton v. Allen*, 5 Denio 434 (N.Y. 1848); *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 186 (1871); *Salt Co. v. Guthrie*, 35 Ohio St., 666, 672 (1880); *Craft v. McConoughy*, 79 Ill. 346, 349 (1875); and *Hoffman v. Brooks*, 6 Ohio Dec. Reprint 1215 (1884).

E. Neither Common Law Restraint of Trade Concepts Nor the Sherman Act Has Ever Been Applied to Higher Education.

Research with respect to both American and English restraint of trade precedents does not produce any case applying the restraint of trade concept to higher education[25] Further, the Sherman Act has never been applied to higher education, nor has an institution engaged in higher education before successfully invoked the Sherman Act. Absolutely no precedent exists for the relief Webster seeks.

F. Because the AMA Decision Brought Only the Business-Like Aspects of the Practice of Medicine Within the Regulatory Scope of the Sherman Act, the Trial Court's Dependence on It Was Erroneous.

In addition to common law cases which applied restraint of trade concepts to the practice of medicine, the *AMA* Court had before it a combination which was clearly motivated by the desire to protect the economic position of the individual practitioner.

In 1937, the AMA, the District Medical Society, and certain individuals entered into a ruthless and concerted

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25 Typical of the English cases construing the meaning of "trade" is *Chartered Mercantile Bank of India, London & China* v. *Wilson*, 3 Ex. D. 108 (1877). Baron Pollock, in considering whether the operation of a telegraph company was a "trade" and therefore exempt from certain duties on housing pursuant to the statute, 32 & 33 Vict. C. 14, S. 11, employed the Johnson definition:

> ". . . wherever any occupation, employment, or business is carried on for the purpose of profit or gain, livelihood, *not in the liberal arts or the learned professions*, it is constantly called a trade." 3 Ex. D. at 120.

Kelly, C. B. added that:

> "We may reasonably say that it [trade] was intended to embrace a great variety of different operations, though all of a commercial character; something therefore like a warehouse, like a shop, like a counting house." 3 Ex. D. at 115.

The approach typical of the American common law is demonstrated by the cases cited by Senator Sherman in the debates on the Sherman Act. These cases lend no support to application of the Sherman Act in the instant case.

course of conduct to destroy Group Health Association (GHA), a prepaid, risk-sharing, medical program. Any member of the District Society who either joined GHA's staff or consulted with physicians on its staff was threatened with disciplinary action. In fact, several members were either forced to resign or were expelled from the Society. Steps were taken to obstruct the doctors on GHA's staff from treating and operating on patients in Washington hospitals. A "white list" of approved organizations, groups and individuals, with the name of GHA omitted, was circulated. Members were threatened with disciplinary action if they dealt with anyone who was not on the list.

The AMA, the District Medical Society, and various other defendants were indicted for a conspiracy in restraint of trade in the District of Columbia, in violation of Section 3 of the Sherman Act. In describing the charge, Chief Judge Groner said:

> "The conspiracy is charged to have had as its background the long continued policy of opposition on the part of American Medical Association to risk sharing plans for medical service, *growing out of the fear of its members of business competition from doctors connected with such organizations.*" 110 F.2d at 707 (Emphasis added).

The Report of the Attorney General's National Committee to Study the Antitrust Laws confirms both the common law test and the necessity of a commercial orientation of the combination to bring it within the scope of the Sherman Act. The Report at 63, n. 232, states with reference to the *AMA* case:

> "Since *at common law* contracts in unreasonable restraint of the physician's right to practice his profession were often held to be unenforceable, the *business aspects* of the learned professions fall within the limits of the Sherman Act, both in the District of Columbia and federal territories, if they fall within the jurisdictional reach of the 'trade or commerce' clauses of the Act." (Emphasis added).

The dangers inherent in an open-ended application of the Sherman Act to the professional—as distinguished from

the businesslike—aspect of medical practice were emphasized by commentators at the time.[26]

The instant case is not concerned with the "businesslike aspects" of higher education. The eligibility criterion, the validity of which is in question, did not spring from economic considerations. It sprang from purely educational considerations, both philosophical and practical. Webster has never even attempted to show that the nonprofit criterion grows out of economic or businesslike considerations. Absent such a showing, the traditional exclusion of higher education from trade retains its full integrity, and the *AMA* cases are not applicable.

III. NO COMBINATION OR CONSPIRACY IN RESTRAINT OF TRADE EXISTS.

The Trial Court opinion manifests a unique—and unfounded—approach to proof of conspiracy or combination. If that approach stands, future plaintiffs suing under the Sherman Act in effect will be relieved from even proving a combination. All they will need to show will be the existence of an organizational structure, no matter what the nature of the organization.

The Trial Court's opinion dismisses the combination requirement of the Act in three sentences:

> "Plaintiff does not contend that the members of Middle States conspired specifically to restrain its trade nor that the six regional associations formed the Federation for that purpose. The evidence negates the existence of any evil, purposeful plotting by the defendant and Webster concedes that the reason for combining was honorable and laudable. However, it is clearly apparent that the intent to combine was

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[26] See Note, *The Medical Profession and the Sherman Act*, 8 GEO. WASH. L. REV., 1034, 1044-45 (1940):

> "Before concluding, however, that the broad and unconfined limits of the Sherman Act should be held applicable to these *business-like phases of the medical profession*, it might be well to consider the possible effects such a decision might have upon the entire professional world . . . *The application of the Sherman Act to the strictly professional phases of medical practice must be avoided in both the interest of the public and members of the profession.*" (Emphasis added).

present in each case and that the two associations, by their very formation, represent combinations and did enter into contracts." 302 F. Supp. at 466.

The Trial Court's holding that the very formation of an association represents a combination is unsound. Not one case is cited in support of the proposition. It flies squarely in the face of precedent. If upheld, it would give rise to wholesale and unwarranted liability.

Middle States has not fixed the price of higher education in the District of Columbia. Middle States has not controlled the availability of higher education to residents of the District. Middle States has not attempted to lower the quality of higher education in the District so that an educational "trust" or monopoly could realize higher profits. Middle States has worked no group boycott against Webster to prevent it from participating in higher education in the District. The facts that Webster has participated in higher education in the District and dramatically increased the size of its student body in the last ten years completely negate its claim.

A. The Trial Court Erred in Finding a Combination or Conspiracy in the Random Behavior of Isolated Members of Middle States.

The Trial Court placed strong reliance on the fact that *some* senior colleges and universities will not accept transfer credits from an unaccredited institution. (302 F. Supp. at 468; FF 57). The Court's theory is unclear. The pattern with regard to acceptance or rejection of credits from unaccredited institutions is totally random. Most Middle States member institutions of higher education *do* accept transfers from unaccredited institutions, although some impose special conditions. There is no proof that most Middle States members do not accept Webster's credits. With regard to Middle States members, Webster was only able to show that 11 such institutions refused to accept their credits out of a total of 346 colleges or universities which are members of Middle States. Webster claims that

over 200 institutions accept their credits. Many of these must be in the Middle States area.

There is no showing of parallelism—much less conscious parallelism—with regard to acceptance or rejection of transfer credits. The Trial Court made no finding that Middle States exercised coercive power on member institutions to reject credits from unaccredited institutions, or indeed, that Middle States had any policy whatsoever on this matter. The challenged behavior in this case—the refusal of 11 institutions which are members of Middle States to accept Webster's credits—constitutes, if anything, "unconscious nonparallelism."

The Trial Court, in effect, attempted to render illegal the behavior of some Middle States member institutions which, on the basis of their own decision, reject Webster transfer credits. The Trial Court sought to make such eccentric behavior itself constitute a Sherman Act violation on the part of an organization to which these few institutions belong.

The Supreme Court has rejected this approach. In *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), a case where proof of parallel action was established, the Supreme Court stated:

> "The crucial question is whether respondents' [members of the alleged conspiracy] conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express . . . [T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, *that such behavior itself constitutes a Sherman Act offense.* Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy but 'conscious parallelism' has *not yet read conspiracy out of the Sherman Act entirely.*" 346 U.S. at 540-41 (Emphasis added).

This Court has closely followed the *Theatre Enterprises* rule. In *Orbo Theatre Corp. v. Loew's, Inc.*, 104 U.S. App. D.C. 262, 261 F. 2d 380 (1958), *cert. denied*, 359 U.S. 943 (1959), this Court affirmed *per curiam* a District

Court opinion, 156 F. Supp. 770 (1958), in which parallel business behavior alone had been deemed insufficient to establish the conspiracy element of a Sherman Act violation.

Plaintiff, a theater operator in Maryland, contended that defendants, who were movie producers and distributors in Washington, violated Section 3 by their practice of withholding release of new movies to it for a 21-day clearance period during which time the pictures were shown exclusively at defendants' theaters in the District. There, as here, plaintiff sought to blow up instances of random behavior into a sinister pattern of intentional, concerted action against it.

Judge Holtzoff's opinion in the District Court, however, held for defendants:

> "The fact that parallel action was taken by alleged conspirators may under certain circumstances justify the court in drawing the conclusion that the parallel action was concerted action. Such an inference is permissible, but is not compelled. Whether to reach it in any particular case depends on the remainder of the evidence and the surrounding circumstances. Parallel action may indeed be concerted action, but it may also be due to the fact that persons concerned arrived at the same simple solution of a common business problem. Here the problem was a comparatively simple one, and the solution reached was more or less obvious. If the various officers and employees involved in the decision refrained from testifying on this point, the court might well draw an adverse inference. On the other hand, considering the fact that there was absolutely no evidence of the alleged conspiracy, beyond the taking of parallel action; that each of the participants denied any communication or consultation with any of the co-defendants; and that none of the witnesses was in any way impeached or gave any testimony that was in any way inherently incredible, . . . the Court is not justified in finding that the actions were jointly planned or concerted. In fact, the Court cannot do so without also reaching the conclusion that some of the witnesses testified falsely. . . . The Court, therefore, concludes that the plain-

> tiff did not establish by a preponderance of the evidence that there had been a conspiracy on the part of the defendants to exercise an undue or illegal restraint against the operations of the Villa Theater." 156 F. Supp. at 775-6.

Judge Holtzoff was affirmed on this and every other point by this Court. 261 F. 2d at 380.

The *Orbo* Theatre decision applies to the instant case. Like the plaintiff in *Orbo* in dealing with random behavior, Plaintiff here paraded before the Trial Court several instances in which Webster students were told that their credits would not be acceptable because Webster is unaccredited. However, representatives of the institutions concerned testified that their individual admissions policies were theirs, and theirs alone, and not dictated by Middle States. Moreover, the number of institutions at which Webster students experienced this difficulty is only a fraction of the Middle States membership. Finally, here too, "there was absolutely no evidence of the alleged conspiracy," and the Trial Court made no such finding. Plaintiff, in short, came nowhere near to meeting its burden of showing by a preponderance of the evidence that there was any conspiracy or even concerted action by Defendant or its members to restrain Plaintiff's "trade."

The rule in this Circuit is followed by other Courts. See, to the same effect, *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F. 2d 199, 202 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962) (uniformity of action found, but held "not enough to sustain a finding of conspiracy," which "remains an essential ingredient of a case based on Section 1."); and *Independent Iron Works, Inc. v. U. S. Steel Corp.*, 322 F. 2d 656, 661 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963) ("The mere fact that two or more of the defendants dealt with plaintiff in a substantially similar manner does not support an inference of conspiracy, even though each knew that the business behavior of another or the others was similar to its own.").

B. Webster's "Trade" Has Not Been Restrained.

Assuming *arguendo* that Webster is in "trade," that "trade" has not been restrained by Middle States. In the Trial Court, Webster made much of the fact that, since 1967, it has suffered a decline in its number of applicants. It sought to lay this decline at Middle States' doorstep as the alleged result of the latter's refusal to accredit. The Trial Court refused to go that far, but it did find as to the number of applications received for the years 1964-70. (FF 52). The Court also found that "the number of applicants denied admission by Webster steadily increased from approximately 100 for the academic year 1960-61 to approximately 200 in 1963-64, which number of rejections has continued annually through 1965-66." (FF 53).

Figure 1 in the Statement of Facts, *supra*, precludes any inference that the decline in applications received has been caused by Middle States. Figure 1 shows that all five women's colleges in the District, including Webster, have suffered a drop-off in applications received, beginning in class year 1966. All the other colleges, save Webster, are Middle States members. At the trial, Appellant introduced unrebutted evidence as to the causes of this decline, including the peak of the post-war baby boom, increasing preference for coeducational institutions, and the highly publicized crime situation in the District. Clearly, if the same "harm" that accrues to Webster also accrues to the Middle States members in the District, the cause lies elsewhere than in the refusal to accredit. The fact that Webster has rejected a greater and greater number of applicants, year after year during the operation of the alleged "conspiracy", hardly constitutes proof that it has suffered irreparable harm from its nonaccredited status.

A final fact militating against the Trial Court's conclusion is the spectacular increase in Webster's profits during the years 1961-67. The unchallenged statistics concerning Webster's financial posture, introduced at the trial by Defendant (DX 525A), show that total college income increased 82.3% by July 31, 1967 over what it was

in the year ending August 31, 1961. More revealingly, while nationally total college and total administrative expense rose 55% and 90%, respectively, Webster's net operating income tripled during the same period.

The Trial Court made no finding that Webster's financial condition had suffered. The robust figure that Webster cuts on the balance sheet is hardly compatible with the image of a victim suffering irreparable harm from a conspiracy . In addition, the lack of any demonstrable monetary damage brings Webster within the rule of cases holding that a private antitrust plaintiff must prove *the fact of damage* as a prerequisite to maintaining the cause of action. Cf. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) (affirming jury verdict where "there was uncertainty as to the extent of the damage, but there was none as to the *fact of damage;* and there is a clear distinction between the measure of proof necessary to establish *the fact that petitioner has sustained some damage*, and the measure of proof necessary to enable the jury to fix the amount.") (Emphasis added).

IV. THE FAILURE OF WEBSTER TO ESTABLISH THAT MIDDLE STATES HAS MONOPOLY POWER OVER HIGHER EDUCATION IN THE DISTRICT, AND THAT MEMBERSHIP IS FOR IT AN ECONOMIC NECESSITY, PRECLUDES RELIEF UNDER THE COMMON LAW.

The Trial Court went beyond all existing common law precedent with regard to voluntary associations. The Court made no finding that Middle States had the power to control Webster's ability to participate in higher education in the District. Nor did the Court make a finding that membership in Middle States was, for Webster, an "economic necessity." In view of Webster's huge increase in profits, it would be impossible to make this finding. Yet, the Court did apparently depend on the common law to grant Webster relief.

The Trial Court enunciated the general rule, followed in this Circuit, which is strongly against judicial intererence in the internal affairs—including membership

policy—of private voluntary associations. *United States ex rel. Robinson v. Bar Ass'n. of the District of Columbia*, 91 U.S. App. D.C. 5, 197 F.2d 408, 410 (1952); *Avin v. Verta*, 106 A. 2d 145 (D.C. App. 1954). The District Court then erroneously based its holding on an exception to this rule, exemplified by *Falcone v. Middlesex County Medical Society*, 34 N.J. 582, 170 A. 2d 791 (1961).

There, a duly licensed and registered physician had been barred by the defendant, the County Medical Society, from membership because he failed to comply with its rule requiring four years' attendance at a medical school. The New Jersey Supreme Court affirmed a lower Court order requiring the doctor's admission. However, the Supreme Court made clear that it did so only because exclusion from the Medical Society made it totally impossible for the doctor to practice his profession, since admission to practice in the local hospitals was a function of membership. The Society, as the Court found,

> ". . . possesses, in fact, a virtual monopoly over the use of local hospital facilities. As a result it has power, by excluding Dr. Falcone from membership, to preclude him from successfully continuing in his practice of obstetrics and surgery and to restrict patients who wish to engage him as an obstetrician or surgeon in their freedom of choice of physicians." 170 A. 2d at 799.

Under the *Falcone* exception, as under the Sherman Act, Webster is thus required to demonstrate that Middle States has the power, and has exercised the power, to preclude Webster from conducting a junior college. Webster's own success belies the assertion that Middle States possesses any such monopoly power.

The Trial Court also was clearly in error in relying on *Hurwitz v. Directors Guild of America*, 364 F. 2d 67 (2d Cir. 1966). That case was an *expulsion*, not an *exclusion*, case: "Therefore, we treat the question of whether DGA's conduct was lawful as though plaintiffs had been *expelled* from DGA membership." 364 F. 2d at 72 (Emphasis

added). The Trial Court itself recognized the well-settled distinction between the two classes of cases in its opinion.[27]

More germane to the issue at bar is a leading exclusion case, *Salter* v. *New York State Psychological Association,* 14 N.Y. 2d 100, 198 N.E. 2d 250 (1964). There, as here, plaintiff failed to meet defendant association's membership requirements, and questioned its right to set membership standards. The New York Court of Appeals unanimously held that plaintiff failed to bring himself within the *Falcone* exception, and denied relief.

V. THE TRIAL COURT ERRED IN UPHOLDING WEBSTER'S CONSTITUTIONAL CLAIM.

The Trial Court embarked on an unprecedented path with regard to the Constitutional claims in Count 2. The Trial Court never found the presence of state action in the case—which must exist before the Constitution can be invoked. Nor did the Court ever name a specific Constitutional right possessed by Webster which had been violated by Middle States.

Nonetheless, the Trial Court granted Webster relief under the Constitution. Its opinion is entirely without precedent. If upheld, it effectively removes the requirement of state action heretofore required in all such cases.

The Trial Court, in passing on Plaintiff's Constitutional claims, never focused on the particular action complained of in this case—the refusal, in 1966, of Middle States to accept Webster's application for evaluation and accreditation. The Court below made no finding that this action constituted state action on the part of either the District of Columbia or the Federal Government.

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27 Even in expulsion cases the right of a regional accrediting association to set its own rules has been recognized. *North Dakota* v. *North Central Association*, 99 F. 2d 697, 700 (7th Cir. 1938) ("The Association being purely voluntary is free to fix qualifications for membership; and to provide for termination of membership of institutions which do not meet the standards fixed by the Association.").

A. Constitutional Restraints Are Applicable Only If the Very Discriminatory Act Complained of Constitutes the State Action of a Sovereign to Which the Complaining Party Is Subject.

The recent case of *Grossner* v. *Trustees of Columbia University*, 287 F. Supp. 535 (S.D.N.Y. 1968), demonstrates the necessity of showing that the particular discriminatory act complained of must be state action to be cognizable under the Constitution. *Grossner* involved the recent disturbances which took place at Columbia. The University set up a special procedure to discipline the students involved. In the District Court, plaintiff students attacked the procedure as a denial of their Constitutional rights. A threshold question was the matter of state action. There, as here, the plaintiffs relied on racial discrimination cases.

Speaking of the record before him on a motion for preliminary injunction, Judge Frankel held:

> "What is still more striking is the total absence of any indication that the State (or any government) is involved as a participant in the University disciplinary proceedings to which the motion for a preliminary injunction is directed. The major precedents plaintiffs invoke on this subject deal with the problem of racial discrimination as it is affected by the Fourteenth Amendment . . . In such cases, 'after sifting facts and weighing circumstances,' . . . decision went against the State or its official agency (commonly, though not necessarily, named the defendant) because there was found 'that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn'. *Note that the critical 'involvement' was in the very 'discriminatory action' under constitutional attack.*" 287 F. Supp. at 548 (Emphasis added).

As in *Grossner*, there is no proof in this case that the Federal Government or the District of Columbia was involved in the "very discriminatory action" under Consti-

tutional attack—namely, the denial of evaluation and membership to Webster in 1966.[28]

In *Grossner*, as in the instant case, plaintiffs argued that the nature of the activity in which Columbia University was engaged—higher education—was a "public function," and that therefore the actions of Columbia should be subject to the Constitution. The Court rejected the argument:

> "Plaintiffs' remaining thought—that Columbia performs a 'public function' in 'educating persons' which may be 'likened to a 'company town' or a party primary system'—is, briefly, without any basis. . . Of course, plaintiffs are correct in a trivial way when they say education is 'impressed with a public interest.' Many things are. And it may even be that action in some context or other by such a University as Columbia would be subject to limitations like those confining the State. *But nothing supports the thesis that university* (or private elementary) *'education' as such is 'state action.'* Cases like Marsh v. State of Alabama, supra—where the party held to have offended the Fourteenth Amendment was *Alabama*, not the Gulf Shipbuilding Corporation, owner of the 'company town'—are of no help." 287 F. Supp. at 549. (Emphasis added).

The Court also rejected as a basis for finding "state action" the fact that Columbia receives substantial sums from the Federal Government. 287 F. Supp. at 547-548.

The Trial Court accepted Webster's theory that it was sufficient if state or Federal governments were involved in some activities of Middle States, even if those authorities were not involved in the refusal of Middle States to accept Webster's application. This approach has been squarely rejected in *Powe v. Miles*, 407 F. 2d 73 (2d Cir. 1968).

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[28] See *Browns v. Mitchell*, 409 F. 2d 593 (10th Cir. 1969). This was an action by disciplined students at the University of Denver under Civil Rights Act. The Court held, citing *Grossner*, that there was no state action involved. "[T]here is no suggestion that the claimed involvement [tax exemption for the University] is in any way associated with the challenged activity." 409 F. 2d at 596.

Appellants, students disciplined by Alfred University, argued there that Alfred's involvement with the State of New York was sufficient to make all of its actions state actions. The Court rejected this:

> "[T]he state must be involved not simply with some activity of the institution alleged to have injury upon a plaintiff *but with the activity that caused the injury.* Putting the point another way, the state action, not the private action, must be the subject of complaint. See Burton v. Wilmington Parking Authority, supra, 365 U.S. at 725 . . . Grossner v. Trustees of Columbia University." 407 F. 2d at 81 (Emphasis added).

In the only other recent case in which the right of an accrediting association to maintain its own standards was attacked, *Parsons College, Inc.* v. *North Central Association,* 271 F. Supp. 65, 70 (N.D. Ill. 1967), the Court held that, as to such associations, "the governing law lies outside the Constitution." Plaintiff college there had sought injunctive relief to prevent the association from withdrawing accreditation. In rejecting the college's due process claim, the Court held:

> "With a corporate charter granted under general law, the Association stands on the same footing as any private corporation organized for profit or not. The fact that the acts of the Association in granting or denying accreditation may have some effect under governmental programs of assistance to students or colleges does not subject it to the constitutional limits applicable to government, any more than a private employer whose decision to hire or fire may affect the employee's eligibility for governmental unemployment compensation." 271 F. Supp. at 70.

On facts analogous to those at bar, New York's highest Court also has rejected an attempt to invoke the Constitution. *Salter* v. *New York State Psychological Association, supra,* involved an attempt by an excluded applicant to force his way into a professional association. This, despite the fact that he failed to meet a membership requirement that an applicant have completed graduate work in psychology. There, as here, plaintiff cited a number of

relationships between the association and the State and argued that, because of them, the association was subject to due process limitations. The Court of Appeals unanimously rejected this argument and held:

> "Petitioner's showing of co-operation between this professional group and the State's own Advisory Council falls well short of the Nixon case's test: 'whether they [political party committee] are to be classified as representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action' (286 U.S. supra. p. 89.) . . . *Co-operation and leadership, advice and reliance on advice—these are shown, but not shown is delegation by or agency of the State.*" 198 N.E. 2d at 253 (Emphasis added).

The action complained of in this case—the refusal of Middle States to accept Webster's application for accreditation in 1966—was the private action of Middle States. Neither the Federal Government nor the District of Columbia participated in any way. No evidence demonstrated that either government had the power to police the membership policy of Middle States.

Further, the Trial Court's reliance on any relationship between Middle States and the Federal Government is totally inapposite in view of Webster's policy against accepting monies from the Federal Government. Of course, the fact that Webster is a profit-making junior college excludes it, as an institution, from receiving benefits under any existing Federal program.[29]

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[29] Even if Webster did attempt to obtain Federal funds, it would be unsuccessful. In all cases in which Federal funds are available to institutions, they are restricted to nonprofit institutions. See Federal Statutes Relating to Eligibility for Federal Funding, Exhibit C to the Appendix. Thus, a profit-making institution of higher education cannot, as an institution, be eligible to receive Federal funds. It is a basic tenet of Congress that public funds can never inure to the benefit of any personal use.

All of the Federal funding statutes make a nonprofit institution eligible for funds if it is "accredited by a nationally recognized accrediting agency or association." However, accreditation is but one of several ways in which an institution may qualify for Federal funds. Most of the statutes provide alternative methods of determining an institution's eligibility. The principal alternative method of determining institutional eligibility is by

B. Precedent Does Not Support the District Court's Holding.

The Supreme Court never has held that a private entity is subject to Constitutional restraints because it performed an "inherently governmental function."

Marsh v. *Alabama*, 326 U.S. 501 (1946) does not support the Trial Court's holding. Appellant there was arrested by the deputy sheriff of Mobile County. The action was against the State of Alabama. Clearly, state action was present. Nor can Webster find comfort in *Terry* v. *Adams*, 345 U.S. 461 (1953) or *Evans* v. *Newton*, 382 U.S. 296 (1966). In these cases, as in *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952) and *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), application of the Constitution was premised on the state's existing regulatory supervision over the particular discriminatory act

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what is called the "3 letter certification." See, for example, Higher Education Amendments of 1968, 20 U.S.C. § 1201. Three accredited institutions certify that they accept transfer credits from the applicant institution on the same basis as they accept transfer credits from accredited institutions. Webster has such a "3 letter certification" at the Office of Education (Sherwood Webster, JA. 189). In addition, many programs state that, in the absence of a nationally recognized accrediting agency which is qualified to accredit a particular class of institutions, the Commissioner of Education shall appoint an Advisory Committee to establish standards pending the establishment of a qualified accrediting agency. See, for example, Higher Education Amendments of 1968, 20 U.S.C. § 435.

Only two programs out of the extensive Federal assistance to higher education indirectly involve proprietary institutions—the college work-study program and the National Defense Student loan program. Higher Education Amendments of 1968, 20 U.S.C. §§ 461(b) and 491. The purpose of both of these programs is to provide financial assistance *to the students* attending the institution and not to the institution itself. Under the college work-study program, students are permitted to work up to 15 hours a week during the academic year and up to 40 hours during vacation. Federal funds pay 80% of the cost and the participating college contributes 20%. Job preference under this program must be given to students from low-income families. The National Defense Student Loan program was established to enable students to obtain low-interest loans in order to complete their education. A participating institution must contribute to the loan fund $1.00 for every $9.00 of Federal funds which is provided. In 1968, some proprietary institutions—schools which provide at least a six months program to prepare students for gainful employment in a recognized occupation—became eligible to participate in these two programs. Webster has not sought to participate in these programs, and has disclaimed any interest in them.

attacked. No such power exists on the part of either the Federal Government or the District of Columbia in this case.

VI. THE NONPROFIT STANDARD, SUPPORTED BY BOTH HISTORY AND PRESENT REALITIES, IS CONSTITUTIONALLY SOUND AND ENTIRELY REASONABLE.

Middle States and the other regional associations are unique institutions in America. Middle States, like the others, grew out of the desire to improve higher education through cooperation among colleges and universities. The accrediting process is the result of this desire.

Middle States always has been an association of nonprofit or public institutions. The eleemosynary concept controls its nature.[30] Institutions freely release faculty members and administrators to serve on evaluation teams in recognition of their professional duty to the entire community of higher education. Institutions to be evaluated open themselves frankly to the constructive criticism of their peers in the hope of improving themselves. Institutions seek accreditation not as an asset which makes them more valuable or more attractive as commercial acquisitions, but because they seek excellence in education.

Middle States never has had a profit-making member in higher education. It has never had a member which sought accreditation because it wanted to increase the profitability of its operation. Middle States has never had within it members who hired faculty, or recruited and taught students, for commercial profit. Middle States has never evaluated an applicant which was owned and controlled in its actions by stockholders.

The evaluative criteria that Middle States has developed over the years have no relevance to profit-making corporations. These criteria contained in "Characteristics of Excellence" and other documents (Brief, p. 11, *supra*) clearly presuppose the eleemosynary nature of the applicant. Middle States has no machinery for policing

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30 Daniel Webster, in his argument, traces the history of colleges as eleemosynary institutions back to the common law. *The Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518, 562 (1819).

the finances of its members. Because its members are nonprofit, stringent financial regulation is unnecessary. Middle States is not equipped to undertake the program of regulation which would be necessary to protect the public against profit-making corporations taking financial advantage of their students.

The introduction of profit-making members inevitably would change the nature of the Association. The present common denominator—devotion of all resources to improvement in education—would be debased by the desire of some members to make as much money as possible on teaching the young. The confidence and trust which presently exist within Middle States could not withstand this intrusion.

Neither Middle States nor the other regional associations desire to foreclose higher education to commercial corporations. They have taken no steps to do so. Webster's own success demonstrates that such corporations can enter the field and prosper. They are perfectly free to form their own accrediting association and set up their own standards and criteria. However, they should not be free commercially to exploit the efforts that eleemosynary institutions have made to improve themselves and thereby better serve the American public.

The nonprofit standard is based on history, necessity, and common sense. It makes a distinction that does no more than recognize reality. The standard certainly does not constitute an "invidious discrimination" repugnant to the Equal Protection Clause of the Constitution, even if that clause were applicable. *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527 (1959) ("'If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'"); *Railway Express Agency* v. *New York*, 336 U.S. 106, 110 (1949)(The question of equal protection is to be answered on practical considerations based on experience, such as whether a classification has relation to the purpose for which it is made); *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940)

("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.").

Further, the standard clearly is valid under any formulation of the Sherman Act "rule of reason." *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231 (1918)("The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.").

This Court recently held that a university is "a community of scholars," where "The readings of the market place are not invariably apt in this noncommercial context." *Greene* v. *Howard University*, 412 F.2d 1128, 1135 (D.C. Cir. 1969). This reasoning recognizes the difference between the educational world and the commercial world.

CONCLUSION

The judgment of the Trial Court should be overruled. Appellee's complaint should be dismissed in its entirety.

Respectfully submitted.

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ADDENDUM

Statutes Involved

Section 3 of the Sherman Act, 15 U.S.C. § 3 provides:

> Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 1 of the Sherman Act, 15 U.S.C. § provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 304(a) of the Higher Education Act of 1965, 20 U.S.C. § 1054(a) provides:

> The Commissioner is authorized to make grants to developing institutions and other colleges and universities to pay part of the cost of planning, developing, and carrying out cooperative arrangements which show promise as effective measures for strengthening the academic programs and the administration of developing institutions. Such cooperative arrangements may be between developing institutions and other colleges and universities, and between developing institutions and organizations, agencies, and business entities. Grants under this section may be used for projects and activities such as—
>
> (1) exchange of faculty or students, including arrangements for bringing visiting scholars to developing institutions;

(2) faculty and administration improvement programs utilizing training, education (including fellowships leading to advanced degrees), internships, research participation, and other means;

(3) introduction of new curriculums and curricular material;

(4) development and operation of cooperative education programs involving alternate periods of academic study and business or public employment;

(5) joint use of facilities such as libraries or laboratories, including necessary books, materials, and equipment; and

(6) other arrangements which offer promise of strengthening the academic programs and the administration of developing institutions.

BRIEF OF THE APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,351

MARJORIE WEBSTER JUNIOR COLLEGE, INC.,
Appellee,

v.

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC.,
Appellant.

On Appeal from the United States District Court for the District of Columbia

November 21, 1969

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"Developments in the Law, Academic Freedom",
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"Judicial Control of Actions of Private Associations",
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"Trade Association Exclusionary Practices: An
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,351

MARJORIE WEBSTER JUNIOR COLLEGE, INC.,
Appellee.

v.

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC.,
Appellant.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE APPELLEE

STATEMENT OF ISSUES PRESENTED

1. Whether it is arbitrary, discriminatory and unreasonable for an educational accrediting agency to refuse to consider a junior college for accreditation solely because of its corporate form.

2. Whether refusal to evaluate educational quality of proprietary institutions is reasonably related to accrediting agency's announced purpose of serving the educational world and the public by establishing standards of quality and identifying institutions which achieve them and also to stimulate and help institutions reach their maximum effectiveness.

3. Whether Middle States, in combination with its member institutions and in combination with the other regional accrediting associations, unreasonably restrained Webster's trade by excluding it from accreditation solely on the basis of its proprietary character, thereby inhibiting its ability to compete with members of Middle States and other regional associations.

4. Whether Middle States is subject to constitutional restraints by virtue of its quasi-governmental role in performing the federal and state delegated function of identifying institutions of quality for purposes of federal aid-to-education programs, state teacher certification, and state loans and scholarship to students.

5. Whether Middle States' refusal to consider the merits of Webster's educational program solely because it is proprietary is arbitrary, unreasonable and contrary to the public interest and, thus, a denial of constitutional due process and equal protection of the laws.

6. Whether Middle States, in excluding Webster because of its proprietary corporate form, has exercised its monopoly power over the type of accreditation necessary to successful continuation of the operation of Webster's junior college in an unreasonable manner and contrary to the public interest in accreditation of institutions of higher education.

7. Whether Middle States' refusal to consider Webster for accreditation will cause Webster to suffer irreparable injury.

8. Whether Webster is entitled to a permanent injunction enjoining Middle States from denying it eligibility for evaluation and accreditation because of its proprietary character.

STATEMENT OF THE CASE

Plaintiff-appellee Marjorie Webster Junior College. Inc. ("Webster") operates a junior college for women in the District of Columbia. Founded in 1920 and incorporated as a for-profit educational organization under D. C. law in 1927, Webster has been accredited by the D. C. Board of Education as a junior college and licensed to award the Associate in Arts degree since 1947.

Defendant-appellant Middle States Association of Colleges and Secondary Schools, Inc. ("Middle States") is a nonprofit educational organization incorporated in New York in 1966. Its predecessor. an unincorporated association. has been in existence since 1886. Middle States is a regional accrediting association whose stated purpose is to serve the educational world and the public by establishing standards of quality and identifying those institutions which achieve them and also to stimulate and help educational institutions to reach maximum effectiveness. Its membership consists primarily of institutions of secondary and higher education which it has accredited. Membership is concomitant with accreditation.

In 1964, Middle States' Commission on Institutions of Higher Education combined with corresponding commissions of the five other regional accrediting associations to form the Federation of Regional Accrediting Commissions of Higher Education through which the six regionals speak with one voice on matters of common interest and establish common policies and procedures. As one of its first acts. the Federation adopted a statement of uniform criteria for eligibility for consideration for accreditation. including the requirement that an institution "should be a nonprofit organization with a governing board representing the public interest."

Webster has never been evaluated for accreditation by Middle States. Finding the lack of regional accreditation increasingly oppressive. Webster asked Middle States in 1966 to waive its nonprofit eligibility criterion and to evaluate its educational program to determine if it merited accreditation. When Middle States refused because Webster is a proprietary institution. Webster brought suit in the District Court seeking an injunction to enjoin Middle States from denying it

eligibility for evaluation and accreditation because of its proprietary character and ordering the association to accept its application for evaluation and to accredit the college if it otherwise qualifies under Middle States' standards. The first count of the complaint alleged that Middle States' refusal to consider Webster's application was an unreasonable restraint of its trade in violation of Section 3 of the Sherman Antitrust Law, inhibiting Webster's ability to compete with members of Middle States and the other regional associations. As amended, the complaint, in a second count, charged that Middle States' refusal was arbitrary, discriminatory, unreasonable and contrary to the public interest. The second count is grounded on two separate theories – first, that Middle States is subject to constitutional restraints because its accrediting function is state action in a constitutional sense and that its refusal to consider Webster was violative of the due process and equal protection clauses; second, that under the common law governing private associations, Middle States, with a monopoly power over regional accreditation in this area, had acted unreasonably in excluding Webster from membership and accreditation which is essential to successfully continuing to operate the junior college.

Following extensive discovery by both parties, cross-motions for summary judgment were filed and denied.

After ten weeks of trial (February 24, 1969 - May 5, 1969), which produced a voluminous record of several hundred exhibits and approximately 7,300 pages of testimony, the trial court granted relief to Webster on both counts of its amended complaint on July 24, 1969. An order was entered on August 1, 1969 enjoining Middle States from denying Webster eligibility for evaluation and accreditation because of its proprietary character and commanding Middle States to accept, process and evaluate Webster's application and to accredit it if it shall otherwise qualify under Middle States' evaluation criteria.

Briefly summarized the District Court held:

1. That it had jurisdiction of defendant-appellant and that venue was properly laid in this district. (Middle States has abandoned its claims of defective jurisdiction and venue, not having discussed them in its brief.)

2. That the Sherman Act is applicable to the facts of this case because Webster is engaged in trade, being a corporation in business for profit, and that it is immaterial whether defendant association is engaged in trade.

3. That Middle States, in combination with its own members and in combination with the Federation, has restrained Webster's trade by refusing to consider it for membership and accreditation, thereby inhibiting its ability to compete in the field of higher education.

4. That the nonprofit criterion which constituted the sole basis of Webster's exclusion does not further Middle States' stated objectives, is not reasonably related to those objectives and is not justified by the evidence and, therefore, the restraint on Webster's trade is discriminatory, arbitrary and unreasonable.

5. That, in carrying on its accreditation function, Middle States acts in a quasi-governmental capacity, performing the federal and state delegated function of identifying institutions of quality for purposes of federal aid-to-education programs, state teacher certification and student loan and scholarship programs, subjecting it to constitutional restraints prohibiting it from acting in an unreasonable, discriminatory and arbitrary manner.

6. That due to the reliance placed on Middle States accreditation by the public and the government in identifying institutions of quality, its accreditation is necessary for Webster to successfully continue to operate its junior college and public policy requires Middle States to exercise its power in a reasonable manner in the public interest; exclusion of Webster solely because of its proprietary character is unreasonable and contrary to the public interest.

7. That Middle States' refusal to consider Webster's application will cause irreparable injury to Webster, unless enjoined.

COUNTERSTATEMENT OF FACTS

Since much of defendant's Statement of Facts is highly argumentative, it will be treated in our Argument, *infra.* However, there are two significant and

material factual matters omitted from defendant's Statement which we are constrained to set out at this point in our brief.

A. MIDDLE STATES' REFUSAL TO CONSIDER WEBSTER FOR ACCREDITATION INHIBITS WEBSTER'S ABILITY TO COMPETE WITH REGIONALLY ACCREDITED INSTITUTIONS, RESTRAINS WEBSTER'S TRADE, STIGMATIZES IT AS INFERIOR, AND CAUSES IT IRREPARABLE INJURY.

1. Lack of Accreditation Stigmatizes an Institution as Inferior and Makes it Difficult to Attract Students.

The trial court found that: "Only Middle States furnishes regional accreditation in the District of Columbia area and thus the only manner in which Webster can obtain certification of the quality of its institution which would be widely recognized by the public is through accreditation by Middle States." (FF 24). Defendant does not dispute that finding.

Middle States publishes a list of accredited institutions which is widely distributed to colleges and secondary schools in its area (P-X-5, J.A. 457). This list states that "accreditation warrants the consideration of acadamic records at face value" and unaccredited institutions must "establish some other basis for confidence in its work" – a basis which is unspecified. (P-X-5, pp. 5-6). This high appraisal of the significance of accreditation is put forward in other widely distributed publications published by Middle States, in which high school students and their guidance counsellors are told that a student is well advised to limit college choice to accredited colleges, since accreditation "carries great weight with other institutions, graduate and professional schools, foreign universities, prospective employers and the Federal Government" (P-X-7, pp. 18-19). The Federation similarly publishes a nationally distributed list of "Accredited Institutions of Higher Education," emphasizing that accreditation warrants confidence in an institution and that the lack of accreditation requires "some other basis for confidence" (P-X-40, p. xiii). Widely used reference works repeat and republish the significance of accreditation and the lack thereof. (P-X-114, p. 91, 202; P-X-38; P-X-148; P-X-39). Due solely to lack of regional accreditation, Webster is assigned an inferior symbol in an annual publication of the American

Association of Collegiate Registrars and Admissions Officers, which is widely used to evaluate transfer credits.[1]

Because Webster lacks regional accreditation, its graduates experience great difficulty in transferring credits to senior institutions. Their range of choice of senior institutions is severely limited. At most senior institutions transfer of credit is either impossible or is granted only on onerous conditions which are not imposed upon transfers from accredited schools. The unaccredited school is, in effect, marked as an inferior institution.[2] Plaintiff's witnesses uniformly recognized without difficulty the harm that would naturally be caused by lack of accreditation.[3] Middle States' own witnesses concede the adverse effect of lack of accreditation.[4] As the Chairman of Middle States Higher Commission stated, "When institutions are turning down graduates of accredited [2-year] colleges, why should they consider graduates of non-accredited colleges."[5]

The effect of this difficulty in transferring credits is felt inevitably in the difficulty which a junior college will have in attracting students. Students in secondary schools are advised by guidance counsellors to avoid unaccredited schools because of the problems which may be encountered in transferring credits.[6]

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1 Webster is given a "D" symbol by the reporting institution, meaning that credits must be validated through examination. (P-X-44, Ruth J.A. 249-53, 266-67).

2 P-X-47a-47mm, J.A. 307-09, 314-15, J.A. 317, P-X-70, J.A. 501-03, 504, P-X-75, J.A. 509, P-X-76, J.A. 517-19, P-X-74, J.A. 492-500, 536-41, 545-47, P-X-72, J.A. 555-60, 562-64, P-X-73B, J.A. 573-75, 579-80, J.A. 1399.

3 Dickey J.A. 3, Elliott J.A. 102, Howard J.A. 143, Stiles J.A. 427.

4 J.A. 706, 707-08, 723-24, 767, 464-66, 460-63, 467-68, 470-71.

5 P-X-152, pp. 53-54, Meder J.A. 629-39.

6 Cook J.A. 195, 198-200, 203-04, Farley J.A. 325-27, Trotter J.A. 299-300.

2. Webster is Denied the Benefits of the Process of Accreditation, Recognized to be a Strong Force for Institutional Development and Improvement.

One of Middle States' principal stated purposes is to improve the level of education. Its Charter recognizes that: "It is understood that the process of evaluation and accreditation is itself intended to foster the development of a climate which will be a positive force in realizing the general purpose of the association . . ." (P-X-1, p. 2). The trial court found that: "The process of accreditation itself, is recognized to be a strong force for institutional development and improvement" (FF 59). Proprietary institutions in the Western Association have benefited by this process. (J.A. 128-30, 136-38). Webster is denied the opportunity to realize this benefit to its institution.

3. Lack of Regional Accreditation Deprives Webster of the Benefits of Federal Aid-to Education Programs.

Under the provisions of the Higher Education Amendments of 1968, "proprietary institutions of higher education" are eligible to participate in the College Work-Study and National Defense Student Loan programs, designed to assist students who need loans or jobs to attend school. Students attending Webster are not eligible to participate in these programs unless Webster is accredited by Middle States. (P-X-123, pp. 10-11, J.A. 375-76, 380, 382-84).

4. Institutions of Higher Education Compete Actively With Each Other for Students, Faculty and Revenue.

Institutions of higher education throughout the country compete with each other for students, faculty, research grants and funds. Bidding for faculty is widespread and particularly intensive. Faculty members may attract grants from government and private sources, which are eagerly sought. Institutions compete for contracts with industry, foundations and the government. These contracts are an important source of funds for institutions of higher education. Institutions of higher education, both accredited and unaccredited, advertise extensively

in newspapers and magazines in an effort to attract students. (J.A. 30-32, 62-64, 90-96, 119-21, 162-165, 190, 231-236, 365-368, 438-39, P-X-133-135).

Competition for students by women's colleges in the District of Columbia is particularly intense, and it appears that it will become more intense in the future. Total applications received by Webster have declined severely in the past four years (P-X-137D, J.A. 192) as they have in other women's colleges. Whatever the reasons for this decline, the effect has been to intensify their competition to attract new students. (J.A. 677-82, 745-49, 793-95, 1022-25).

5. Webster is Engaged in Trade in the District of Columbia.

Webster is organized as a corporation for profit in the District of Columbia. It provides educational services to its students, along with the athletic, cultural and social activities and services inherent in a residential college. It supplies room and board to most of its students (J.A. 182). Its major income is derived from charges for tuition, room and board. This income is spent primarily for payroll, instruction, maintenance and supplying room and board. Webster pays income taxes to the federal and District governments, plus payroll and sales taxes. (J.A. 182-185).

B. THE FUNCTION OF ACCREDITATION AS PRACTICED BY MIDDLE STATES, IS STATE ACTION IN A CONSTITUTIONAL SENSE.

1. Accreditation is Normally a Function Performed by Governments, Which Has Been Assumed by "Private" Associations in the United States Because State Standards are Diverse and Unreliable.

Education at various levels has played a vital role in the building of a strong democratic society. It has become one of the most important functions of government. As the demands of modern society have become increasingly complex and exacting, this responsibility has shifted increasingly to this country's colleges and universities (D-X 188A, p. 1). The individual states carefully control the issuance of charters and the awarding of academic degrees within their borders.

Generally, an institution of higher education may not even open its doors without State authority.[7] As higher education has become increasingly important to the country, the federal and state governments have dramatically increased their financial outlays for higher education. Within the past thirty years, the federal contribution to total income for colleges and universities has increased from 6% to 25% of the total. (P-X-116, p. 8107, P-X-116, pp. 8009, 8017, 8103, 8107, P-X-118, P-X-119, pp. 2-3).

Accreditation is inherently a governmental function. Unlike most other countries of the world, the United States has no ministry of education or other centralized authority which exercises direct control over educational institutions and their standards. States and other political units assume varying degrees of control, but state standards and institutions vary widely. The pattern of accrediting standards and responsibility assumed by the states is diverse, so that state standards may mean much or little, depending upon the state. (P-X-39, pp. 1, 5, 129-131, J.A. 372-74, 350-51).

In the absence of a national ministry of education to set standards, and in the absence of a reliable system of state accreditation, private accrediting associations have undertaken this inherently governmental function of establishing standards and identifying those institutions which achieve them. Of these private associations, only the regional associations award general accreditation to total institutions (such as Webster) which have undergraduate, liberal arts based programs (P-X-39, pp. 1-5, 129, J.A. 380).

As the sole available association to grant institutional accreditation in its area, Middle States exercises substantial control and power over the organization and curriculum of its member institutions through the accreditation process. It has determined which public and private institutions in Pennsylvania may conduct masters degree programs (P-X-36A, p. 5, foot of page, p. 6, foot of page,

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[7] 8 Del. Code Anno. 125, 29 D. C. Code 415, 77 Md. Code Anno. 310, 18A N. J. Stat. Anno. 68-1, 16 Cons. Laws N. Y. 216, 24 Penn. Stat. Anno. 2422.

p. 8, 9, mid-page, p. 10, foot of page). Public and private institutions are advised by Middle States as to which programs should be offered, the appropriate faculty teaching load, revisions in curricula, and the manner in which institutions should be governed (P-X-36A, p. 7, foot of page: P-X-36A, p. 8, foot of page; P-X-36B, p. 3, mid-page; these are just examples – the minutes in P-X-36A – F contain numerous instances of such advice). Federal academies educating officers for the U. S. Armed Forces are directed to furnish compliance reports with Middle States on recommendations concerning curricula, faculty, library and control of these academies. (P-X-36F, p. 10, mid-page: P-X-36A, p. 17, mid-page). Public colleges are threatened with loss of accreditation if state educational agencies do not accept Middle States' recommendations. State superintendents of education are told by Middle States when state planning is inadequate. (P-X-36E, p. 5, above mid-page, P-X-36D, pp. 7, 17; P-X-36F, pp. 15-16).

Through a system of recommendations, requiring reports, and the threat of loss of accreditation, Middle States ensures that its suggestions and advice are followed. When an institution refuses to comply with Middle States directives, its accreditation is jeopardized. Such loss would so stigmatize a school that it does what is necessary to comply, even disobeying an order of its own Board of Trustees. Significantly, no institution has ever lost its accreditation. Every "show cause" order from Middle States has been vacated, since institutions have uniformly put their affairs in the "good order" specified by Middle States (P-X-35H, p. 3, J.A. 639(1), 640-51).

2. Middle States Serves as an Agency of the Federal and State Governments Exercising Delegated Power to Identify Institutions Eligible for Federal and State Programs.

After receiving extensive evidence concerning Middle States' relationship with Federal and state governments, the trial court made the following finding of fact (FF 61):

"Both the Federal and state governments have utilized Middle States and other regional accrediting associations as agencies to identify institutions as worthy of benefits conferred by the government. The regional accrediting associations have operated as service agencies for the Federal government in determining eligibility for funding. Moreover, Middle States function as an agency to identify institutions of quality is not limited to its relationship with the Federal government. In states under its jurisdiction, it has been recognized as an agency to identify institutions of quality for purposes such as teacher certification, state loans and state scholarships."

Middle States has not contested this finding in its brief, and must, therefore, be assumed to have accepted it. Consequently, in this statement of facts, Webster will only briefly describe the record references which support this finding.

Most of the statutes providing for federal aid to higher education require that to be eligible an institution must be "accredited by a nationally recognized accrediting agency or association."[8] The regional accrediting associations are the only associations recognized by the U. S. Commissioner of Education as reliable agencies concerning the quality of training offered by total institutions of a non-specialized nature, such as Webster (P-X-123, J.A. 377-78, 380). Regional accrediting agencies have become service agencies of the federal government in determining eligibility for funding (Proffitt, J.A. 1510-18). Such accreditation has become the "prime functional means of establishing eligibility for federal assistance" (Proffitt, J.A. 1511).

Middle States' function as a service agency exercising power delegated by the federal government to select eligible institutions is best illustrated by the function of the regionals in supplying the U. S. Commissioner of Education with "letters of reasonable assurance," and in the establishment of "correspondent" status. With the establishment of numerous new colleges to meet the demands

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[8] These statutes generally provide as alternative grounds that eligibility may be established if three accredited institutions accept credits from an institution as if it were accredited or if an institution can give "satisfactory assurance" that it will meet standards of an accrediting agency within a reasonable period of time. Both of these alternatives rely upon the standards of the accrediting agency.

of higher education, Congress was faced with the problem of determining which of these institutions were worthy of grants and benefits from the federal government. Since these new institutions had not yet graduated a class, they were not eligible for regional accreditation. Consequently, Congress included in federal aid legislation a provision that eligibility of an institution could be established if the Commissioner of Education had "satisfactory assurance" that the institution would meet the standards of the accrediting agency within a reasonable period of time. To implement this statutory test, the regional associations and the U. S. Office of Education ("USOE") developed a procedure whereby the regionals would evaluate new institutions and furnish USOE a "letter of reasonable assurance" for those institutions which appeared likely to achieve accreditation within a reasonable period of time. (Proffitt, J.A. 1509-18). In late 1967, by agreement with USOE, the regionals changed this procedure in form, but not in substance, creating a new pre-candidacy status to be called "correspondent," to replace the "letter of reasonable assurance." (Proffitt, J.A. 1514-18). In adopting this new status, the regional associations explicitly recognized that they had been operating "as service agencies for the USOE in helping to determine the eligibility for participation in federal aid programs for newly founded institutions." The change in status was made solely to avoid the implication of government activity by the regionals, but the change was only in form. Consequently, determinations as to correspondent status are made solely for purposes of determining eligibility for participation in Federal programs (P-X-37G, pp. 1-3, P-X-37G-1).

The regional associations maintain close contact with officials of the United States Office of Education to facilitate the regionals' function in determining eligibility for federal programs (Proffitt, J.A. 1510-16, see also P-X-51G).

Middle States' function as an agency to identify institutions of quality is not limited to its relationship with the federal government. In every state under its jurisdiction, it has been recognized as an agency to identify institutions of quality for purposes such as teacher certification, state loans, state scholarships, or, in the case of the District of Columbia, admission to the bar of the United States District Court (Local Rule 93, P-X-71A, p. 1, Ann. Code Md., Art. 77, Sec. 100, P-X-66, p. 3, P-X-150, Ann. Code Md., Art. 77, Sec. 313(e), P-X-68, P-X-50, J.A. 1434-38).

ARGUMENT

Summary

The trial court properly held that Middle States' refusal to consider Webster for accreditation because it is organized as a for-profit corporation is discriminatory, arbitrary and unreasonable, that it will cause Webster irreparable injury and that Webster is entitled to an injunction against such refusal. The record amply supports the trial court's holding that the nonprofit criterion does not serve Middle States' stated purposes, is not reasonably related to those purposes and is unjustified by the evidence. Lack of accreditation stigmatizes Webster as an inferior institution, makes it difficult to attract students and to transfer them to senior colleges and renders its students ineligible for certain federal and state benefits.

The trial court properly held that, in combination with its members and the Federation, defendant has unreasonably restrained Webster's trade in violation of the Sherman Act, inhibiting its ability to compete with regionally accredited institutions.

The trial court properly held that defendant is subject to constitutional restraints against unreasonable and discriminatory action because it acts in a quasi-governmental capacity, performing federal and state delegated functions of identifying institutions of quality for purposes of federal and state programs.

The trial court properly held that defendant's accreditation is necessary for Webster to successfully continue to operate a junior college. In this area, Middle States has a monopoly of the type of accreditation widely recognized by the public as a certification of quality. Under the common law, defendant must exercise this monopoly power in a reasonable manner in the public interest. Exclusion of Webster due to its proprietary form is contrary to public policy in the District of Columbia as expressed by Congress and as implemented by the Board of Education in licensing Webster's junior college.

I. DISTRICT COURT PROPERLY HELD THAT REFUSAL TO CONSIDER WEBSTER FOR ACCREDITATION SOLELY BECAUSE IT IS PROPRIETARY IS UNREASONABLE

A. Proprietary Exclusion Bears No Reasonable Relationship to Objectives and Purposes of Middle States.

Middle States declares that its evaluation and accreditation of institutions of higher education "has a double purpose * * * to serve the educational world and the public by establishing standards of quality and identifying institutions which achieve them" and "to stimulate and help institutions reach their maximum effectiveness." (P-X-4C, p. 1). Defendant does indeed render vital services, such as publishing lists of accredited institutions (P-X-5), available student spaces in member institutions (P-X-9A), and tips on college selection (P-X-7) for high school students and guidance counsellors. Accredited lists are used by colleges to evaluate transfer credits and by college directory publishers to indicate the general standing and quality of an institution. Accredited status is relied on by federal and state governments in connection with aid-to-education programs, teacher certification and student loan and scholarship programs. Failure to consider proprietary, liberal arts institutions eligible for accreditation deprives educators, the public and the governments of much needed information about the quality of such institutions which is not available from any other source. The public need for protection against proprietaries with inferior programs is not being served. The only way to afford such protection, as Middle States does with respect to inferior nonprofit schools, is to evaluate them all and accept or reject them on the merits of their educational programs. By excluding one segment of liberal arts higher education, Middle States has abdicated its responsibility to inform and protect the public and to render valuable assistance to the field of higher education and the governments in determining the quality of institutions. The proprietary exclusion does not serve Middle States' announced purpose of establishing standards of quality and identifying institutions which achieve them.

The other primary objective of the association's accreditation function, to stimulate and help institutions reach their maximum effectiveness, is partially defeated by the proprietary exclusion. One of the significant benefits of the accreditation process is the impetus to improve the program that is generated by the critical evaluation of its strengths and weaknesses, first, in the institution's self-study, an analysis of its educational resources and effectiveness by its own staff (P-X-13) and, second, in the examination of the institution by the Middle States' evaluation team of experienced outsiders (D-X-208). Finally, according to the association, "there is the continuing activity within the institution which the evaluation process has stimulated." (D-X-208). This process affords the school an opportunity to realize its deficiencies and furnishes it with guidelines for improvement. Proprietaries are denied this important stimulus to betterment of their programs. Any self-study outside the framework of the accreditation process, without the expectation of examination by an evaluation team and the ultimate judgment of the accrediting body, is not effective since it is the preparation for the analysis and judgment of the outside body of experts that provides the necessary stimulus to recognize and remedy weaknesses. (J.A. 9, 430).

The arbitrary exclusion of proprietaries defeats, to an important degree, Middle States' announced purposes and unduly restricts its service to the public and the educational world.

B. Exclusionary Criterion is Result of Prejudice Against Profit Motive and Has No Empirical Basis.

Middle States' justification of the nonprofit criterion rests on the *theory* that the profit motive is at odds with the educational process and its *assertion* that its evaluative criteria could not be used to evaluate a proprietary.[9]

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9 At trial, it also sought to establish, by expert opinion testimony, that its tax-exempt status would be lost if it admitted institutions organized on a for-profit basis. Webster countered with expert opinion that the tax-exemption would not be jeopardized. (Richmond, Tr. 6757-6834). Since there is no mention of this in Middle States' brief, it has apparently recognized the weakness of this point and abandoned it.

In this section of our brief, it is not our purpose to discuss the merit of Middle States' justification, but merely to point out that there is no empirical basis for it. One would assume that a body of distinguished and learned academicians would arrive at the fundamental proposition that proprietary institutions were unworthy of consideration only after significant experience with proprietaries or, at least, on the basis of a thorough study of the validity of proprietary education. Yet, this is not the case. Middle States' expert witnesses shared not only an evident distaste for profit making in education, but also a complete lack of any experience in evaluating proprietary institutions of higher education and, with a single exception, none had ever served on the administration or faculty of a proprietary. (Christensen, J.A. 920, McCormack, J.A. 1018, Everett, J.A. 1374, Stoops, J.A. 1375, Jones, J.A. 1460). Unable to cite any empirical data or research on the relationship between the quality of the educational program and the proprietary corporate form, the witnesses theorized and speculated on the adverse effect of the profit motive on the program. Their lack of a solid, factual foundation for their opinions is not surprising in view of a recent USOE study. John Proffitt, Chief of the Accreditation and Institutional Eligibility Staff of USOE, testified that his office had searched in vain for empirical or research data showing the relationship between educational quality and the proprietary character of an educational institution. Neither a search of educational literature of the past ten years nor inquiries of knowledgeable educators turned up any such data. (Proffitt, J.A. 385-388). There was no attempt by defendant at trial to show that the history of proprietary education demonstrates its inferiority. Defendant's expert in the history of higher education, Professor John Brubacher, said nothing to indicate any historical deficiency in profit making educational institutions, except for a brief reference to the Flexner Report in 1910 which dealt with defects of medical schools, both profit and nonprofit, in the early 1900's. (D-X-195; Brubacher, J.A. 1110-11).

Moreover, Middle States did not claim to have conducted any investigation of proprietaries in connection with adoption of the exclusionary standard or its

reaffirmation over the years. Defendant readily admits it has never evaluated a proprietary institution of higher education. (Defendant's brief, sec. VI). On the only occasion in recent times when it formally considered opening membership to proprietary colleges, the committee assigned the task of studying the question, recommended that the nonprofit standard be retained. (D-X-152). The chairman of that committee, Albert Meder, admitted that the committee had not investigated proprietary institutions or gathered any data about them. (J.A. 666-67). In outlining the historical background of defendant's nonprofit criterion, F. Taylor Jones, Executive Secretary of the Higher Commission, made no mention of any study of or experience with proprietaries on which the Middle States rule was based. (J.A. 1416-22).

Thus, it is apparent that those opposed to the eligibility of proprietary institutions for regional accreditation have nothing but theory and speculation as the foundation for their position. Considering that they are academicians supposedly dedicated to the pursuit of truth, it is incredible that they would hold such a view without examining the facts.

Manifestly, the proprietary exclusion stems from a strong, unyielding prejudice against the profit motive in education. This distressing, but unavoidable, appraisal of the situation is all the more convincing when one reads defendant's own literature. In evaluating institutions for accreditation, the association does not apply precise quantitative criteria. Using broad qualitative standards, it measures each college in terms of its own educational objectives. There is no model against which institutions are tested. Middle States seeks to determine whether the school has clearly defined appropriate objectives, whether it appears to be attaining them and to be able to continue to do so. (D-X-13B, p. 1). Accreditation means that the institution has achieved quality in the context of its own aims and program. The focus of the examination is the quality of the educational program, not the form of organization or administration. In "The Nature of a Middle States Evaluation" (P-X-12), it states "Organization, administration, facilities and resources are not important in themselves." F. Taylor Jones, Executive Secretary of the Higher Commission, has declared that:

> "the real test of a college * * * is the effect it has on its students. * * * nothing else matters of itself. Organization, administration * * * exist only to make teaching and learning possible. * * * They are just means to an end. * * * The only reasonable way to assess an institution is to ask how successfully it actually does what it was established to do. Its methods are good whatever they are if they get the results it wants." (D-X-212, p. 295).

In a Middle States publication describing general criteria for 2-year colleges, it is said, "The forms of American educational institutions are less important than their functions * * *". (D-X-149A, p. 2).

In defendant's own words, the test of accreditation is the quality of the educational program, not the means used to attain it. How then can defendant justify its automatic exclusion of an institution because it uses a proprietary form of organization to achieve a quality program?

C. Record Shows Preponderance of Factual Evidence Demonstrating Unreasonableness of Proprietary Exclusion.

1. Western Association evaluates and accredits proprietary institutions of higher education.

Like Middle States, the Western Association of Schools and Colleges ("Western") is a regional accrediting association and a member of the Federation. Its accrediting procedures and evaluative standards are similar to those of Middle States,[10] involving self-study by the institution, evaluation by a visiting team and accreditation by a commission under broad qualitative standards. (Statement of Standards, Western Assn., P-X-78; P-X-79; Armstrong, J.A. 128-35).

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10 "While the accrediting procedures of the regional associations differ somewhat in detail, their rules of eligibility, basic policies and levels of expectation are similar. These similarities are being further developed through the Federation * * * to which they all belong." p. xii-xiv, "Accredited Institutions of Higher Education," issued by the Federation (P-X-40).

Three proprietary institutions of higher education have been accredited by Western: Armstrong College since 1963, Brooks Institute of Photography since 1963 and Woodbury College since 1961. (P-X-40, pp. 7, 17). Each has been reevaluated and reaccredited at least once since 1964 when Western joined the Federation and agreed to the nonprofit criterion of eligibility.

Middle States' assertion that its evaluative criteria are not suitable for evaluation and accreditation of proprietary institutions loses all credibility in the light of Western's unquestioned ability to evaluate and accredit three proprietary colleges under similar standards and procedures. Western evaluated the proprietaries with the same standards it uses for nonprofits to determine educational quality. (Herrick Dep., J.A. 488-91). Dr. Herrick, Executive Secretary of Western's Senior Commission, declared that the proprietary status was irrelevant to determination of academic quality:

> "Q. Well, do you make this evaluation without reference to the fact that the institution is proprietary?
>
> A. I don't see what that has to do with it." (Herrick Dep., J.A. 491).

All of the members of the evaluation team which conducted the latest visit to Armstrong College were from nonprofit institutions (Armstrong, J.A. 134). It does not appear that they had any difficulty applying Western's accreditation standards.

Armstrong, Brooks and Woodbury are tangible proof that the proprietary form of organization does not preclude a qualitative analysis of an institution for regional accreditation and that for-profit colleges can attain a level of educational excellence meriting such accreditation.

2. Middle States evaluates and accredits three proprietary secondary schools.

Accreditation of secondary schools in the Middle States region is conducted by its Commission on Secondary Schools, utilizing, for evaluation of the schools,

broad qualitative standards comparable to those of the Higher Commission. Evaluation seeks to determine whether the program is appropriate for the school's own objectives. (Cresswell Dep., pp. 22-23, J.A. 472). Although proprietaries are no longer eligible for consideration, the Secondary Commission continues to evaluate and accredit three proprietary secondary schools located in New York City – Dwight School and Franklin School, both accredited since 1928, and Rhodes School, accredited since 1949 (Stipulation 32.1, Tr. 44). Periodic evaluations have led to renewal of their accreditation. (Cresswell Dep., p. 62, J.A. 472). There has never been a suggestion that their accreditation be withdrawn. (Cresswell Dep., p. 78, J.A. 472). These three schools are further evidence that proprietary institutions can be evaluated with qualitative standards and found worthy of Middle States' approval.[11]

3. District of Columbia government accredits Webster.

In 1946, Webster was accredited by the D. C. Board of Education and licensed to award the degree of Associate in Arts (P-X-43, P-X-39, p. 134),[12] on the basis of a visiting committee's examination of the college which bore out "the excellent reputation of this institution." (P-X-43, p. 163). The statutory standards of accreditation require satisfactory curriculum, a reasonable number of qualified faculty and adequate facilities. (See 31-120, D. C. Code, in Addendum hereto). Webster's accreditation and degree-granting authority has been extant without interruption since 1946. The accreditation and licensing of plaintiff is an expression of public policy of the District. Defendant's refusal to consider Webster severely curtails the exercise of the authority conferred upon the plaintiff to operate a degree-granting educational institution for it cannot successfully continue without regional accreditation. Such exclusionary practice

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[11] Dr. Dickey testified there is "as much need [for proprietaries] in one area [higher education] as in the other [secondary education]." J.A. 41.

[12] Accreditation as a junior college was pursuant to 31-120, D. C. Code (1967 ed.); licensing was pursuant to 29-415, D. C. Code (1961 ed). Latter function was transferred to newly formed D. C. Board of Education in 1966.

on defendant's part is in derogation of the rights and privileges accorded Webster by the District government and is contrary to public policy.[13]

In the context of reasonableness, it is basically unfair to refuse to consider for accreditation an institution which is approved and licensed by the D. C. government.

4. Three regionally accredited universities accept Webster credits on same basis as credits from institutions with regional accreditation.

For an unaccredited institution to be listed in the HEW directory of higher education, it has been required by USOE to furnish letters from at least three regionally accredited colleges or universities certifying that its "credits have been and are accepted as if coming from an accredited institution." (P-X-52, p. 1). Plaintiff has been listed in said directory for ten years on the basis of appropriate letters from American University (accredited by Middle States), University of Maryland (accredited by Middle States), and University of North Carolina (accredited by Southern Association). (S. F. Webster, J.A. 188-89). Such representations by the three universities, including two members of defendant association, were made on the basis of actual experience with transfers from Webster and are indications that the Webster graduates had done acceptable academic work at the senior institutions.

5. Congress recognizes efficacy of proprietary institutions of higher education.

The proprietary exclusion is also unreasonable because it denies the efficacy and legitimacy of proprietary higher education which is explicitly recognized by Congress in the Higher Education Amendments of 1968, making students in "proprietary institutions of higher education" eligible for the benefits of the

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13 See "Exclusion from Private Associations," 74 Yale L. J. 1313, 1321 (June, 1965), suggesting that state licensing should entitle an applicant to presumption of qualification for membership in private associations.

College Work-Study program and the National Defense Student Loan program. (P. L. 90-575, 82 Stat. 1014, pertinent provisions in Addendum to this brief; P-X-139, p. 2; P-X-123, p. 10; Proffitt, J.A. 384). If Congress regarded the proprietary form of education as inherently inferior, it would not have authorized federal funds for students to attend proprietary institutions of higher education.[14]

6. Other accrediting agencies accredit both nonprofit and proprietary institutions.

Proprietary educational institutions are eligible for accreditation by the Engineers' Council for Professional Development, the Accrediting Commission for Business Schools and the Commission on Independent Secondary Schools of the New England regional association, each of which is officially recognized by the U. S. Commissioner of Education.[15] In addition, the Joint Commission on Accreditation of Hospitals accredits proprietary as well as nonprofit hospitals on a nationwide basis.[16] If the professional accreditors in these agencies have found proprietaries to be eligible and worthy of accreditation, serious doubt is cast on the soundness of defendant's proprietary exclusion.

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14 Congressional recognition of the efficacy of proprietaries is in no way diminished by the fact that eligibility for aid to institutions (as distinguished from aid to students) is limited to nonprofit institutions. Such limitation simply reflects a policy of not giving federal funds to profit-making enterprises and is unrelated to the educational quality of such institutions.

15 Proffitt, J.A. 381, P-X-103, Cotton, J.A. 1479(7)(a).

16 P-X-151, p. 10, indicates that the symbol "1" in the "Approvals" column means accredited by Joint Commission on Accreditation of Hospitals. The symbols "31," "32" and "33" indicate proprietary hospitals. The text of "Registered Hospitals" shows numerous proprietary hospitals with accreditation. See, e.g., pp. 41-46.

D. **Weight of Expert Testimony Supports District Court's Holding That Nonprofit Criterion is Arbitrary, Discriminatory and Unreasonable.**

1. Diverse group of prominent educators declared proprietary exclusion unjustified and contrary to best interest of higher education.

After ten weeks of trial, a large part of which consisted of opinion and factual testimony by experts on the "reasonableness" issue, the trial court found that:

> Educational excellence is determined not by the method of financing but by the quality of the program. (FF 60).

and concluded that:

> The refusal of the defendant to evaluate the plaintiff's educational program solely because of its corporate form is arbitrary, discriminatory and unreasonable. (CL 4).

The above finding of fact and conclusion of law are afforded ample support by the weight of the expert testimony. The conflicting expert opinions can best be evaluated in the light of the qualifications, background and possible bias of the educators who testified. Of the nine Middle States' experts, who gave opinion testimony on reasonableness of the nonprofit criterion, eight came from institutions which rely on Middle States for their regional accreditation;[17] four were current or former Middle States officials;[18] one had served as an evaluator for defendant's Secondary Commission;[19] one had served as chairman of numerous Middle States evaluation teams[20] and one had served on a commission

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17 Mr. Blum (Point Park College), Dr. Christensen (Lehigh), Dr. Donovan (Seton Hall), Dr. Everett (New School for Social Research), Dr. Lester (Haverford), Mr. Meder (ret., Rutgers), Sister McCormack (Manhattanville), Dr. Stoops (Lehigh).

18 Dr. Christensen (President); Dr. Lester and Sister McCormack (Members, Higher Commission); Mr. Meder (former chairman, Higher Commission).

19 Dr. Stoops.

20 Dr. Donovan.

of the Southern Association.[21] The only one of the nine who had no connection with Middle States was Dr. Brubacher. With that single exception each had an interest in maintaining the status quo and supporting the regional accrediting establishment. Their testimony should be viewed in the light of an apparent lack of disinterestedness. On the other hand, the objectivity of Webster's ten expert witnesses was ensured by their lack of connection with plaintiff's institution.[22] Collectively, they brought to the stand a broad spectrum of experience and philosophy, including unimpeachable credentials in higher education and considerable expertise in accreditation. There were five with current or past experience as college presidents.[23] They ranged philosophically from Dr. Milton Friedman,[24] a leading conservative economist and professor at the University of Chicago, to Christopher Jencks, past education editor of The New Republic and co-author of the prize-winning book "The Academic Revolution." They came from both private and public nonprofit institutions within and without the Middle States region. Dr. Frank G. Dickey, Executive Director of the National Commission on Accrediting, an organization of 1,420 colleges and universities in the U. S. which coordinates and monitors 25 specialized and professional accrediting agencies, is Chairman of the USOE Advisory Committee on Accreditation and Institutional Eligibility and former Director of the Southern Association of Colleges and Schools. Dr. William Gaige, Director of Research of the Massachusetts Advisory Council on Education, had been a member of the Commission on Institutions of Higher Learning of the New England regional association. Dr. Lloyd

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[21] Dr. Everett.

[22] With the sole exception of rebuttal witness, Dr. Martin, who had served as a paid consultant to Webster, all disclaimed any first-hand knowledge of Marjorie Webster Junior College.

[23] Dr. Dickey (former President, Univ. of Kentucky); Dr. Elliott (President, George Washington Univ.); Dr. Howard (President, Rockford College); Dr. O'Neill (President, Boston State College); Dr. Gaige (former President, Rhode Island College).

[24] In evaluating Dr. Friedman's testimony, it should be noted that he has often rejected "fat fees" to testify as an expert, but that he testified in this case without a fee because he wished to strengthen higher education (J.A. 210).

H. Elliott had experience as an evaluator with the defendant association and had undergone a Middle States' evaluation as Chairman of the self-study committee at Cornell.

This diverse group of professional educators and accreditors testifying for Webster agreed that the proprietary exclusion is unreasonable. The limitations of this brief do not permit full discussion of the expert testimony. The following is an effort to synopsize it in a form deemed to be most elucidating.

(a) The hypothetical questions put to Webster's experts.

In order to elicit expert testimony, plaintiff propounded three basic hypothetical questions:

The *first* hypothetical question (J.A. 4-7) was based upon the existence of the plaintiff as a licensed junior college in the District of Columbia, a statement of the purposes and significance of regional accreditation as published by Middle States, and the existence of the proprietary exclusion. The experts were asked whether this exclusion serves the stated purposes of regional accreditation.

The *second* hypothetical question (J.A. 9-12) was based upon the reasons which Middle States, prior to trial, had given for the proprietary exclusion. (P-X-10). These are: (1) The profit motive keeps a proprietary institution from devoting all of its resources to the educational program; (2) There is an inherent lack of continuity in a proprietary institution, as its character can be changed overnight at the whim of the owner; (3) The position of the faculty at a proprietary institution is weak, with adverse effects upon tenure and academic freedom; (4) The owner of a proprietary might be unwilling to give required financial data to the evaluating team; (5) Independent, publicly responsible institutions should be protected from proprietaries; and (6) Because of the tax laws, donors are more likely to support a nonprofit institution.

The *third* hypothetical question (J.A. 19-20) was based on the Middle States Report of January, 1969, to its membership (P-X-104), justifying defense of this

suit. In essence, it states that a proprietary institution can not have "institutional integrity" since all decisions will be colored by the profit motive in a manner too elusive to be identified by the evaluation process. The report contends also that the goals of a proprietary institution are at odds with the educational process and might interfere with academic freedom.

(b) Responses to the first hypothetical question – whether the proprietary exclusion serves the purposes of regional accreditation.

Plaintiff's experts uniformly held the view that the exclusion does not serve the stated purposes of regional accreditation.

(1) It does not serve the stated purpose of establishing standards of quality and identifying institutions which achieve them, the primary reason for the existence of an accrediting association. The public uses the accredited list to assist them in selection of institutions. Other colleges use the list as a guide to institutional quality for purposes of granting transfer credit. Failure to make all existing institutions eligible for inclusion in the list deprives the public and other institutions of information which they need and which they can obtain only from the list. The only way to protect the public from inferior institutions (profit and nonprofit) is to evaluate all of them and accept or reject them on the merits of their educational programs. The association is abdicating its responsibility to inform and protect the public. Educational excellence is far too complex to be determined on the basis of a single piece of information standing alone, to wit, whether the institution is proprietary or nonprofit. Many factors, such as excessive dominance by a state legislature or a tendency to promote a particular social or religious ideology, are very damaging to the pursuit of truth and academic excellence. These factors affect public and private nonprofit institutions, but do not disqualify them from eligibility. In essence, the important factor is the educational program, regardless of the type of organizational structure. This program can and should be evaluated so that institutions of quality may be identified. (Dickey, J.A. 8-9, 28-29, Jencks, J.A. 48, Elliott, J.A. 103, Gaige, J.A. 352, Stiles, J.A. 429-30).

(2) It does not serve the stated purpose of stimulating institutions to reach their maximum effectiveness, since proprietary schools are denied this stimulation. One of the most significant benefits of the accreditation process is the stimulating and beneficial effect of the process upon the institution. Self-evaluation without the expectation of evaluation by an evaluation team and the judgment of the accrediting commission is not effective – since this ultimate judgment is required for the stimulation to be effective (Dickey, J.A. 9, Stiles, J.A. 430).

(3) There is currently a serious shortage of educational facilities in the United States. Consequently, no group of institutions should be excluded arbitrarily without considering the merits of each institution. New sources for potential development of institutions should be encouraged and developed to meet this demand. (Jencks, J.A. 52, Coleman, J.A. 78, Friedman, J.A. 208).

(4) The profit motive is perhaps the single most effective device which has been developed by our society to stimulate quality through the freedom of public choice among competing institutions. Bureaucracy and inefficiency threaten higher education at this time. The proprietary approach would make it possible for market factors to induce efficiency and reduce educational costs. The profit motive would force institutions to provide strong, effective programs, since weak programs would be rejected by the public.

A proprietor will, of course, pursue his self-interest, but this is desirable. Our system of enterprise, which has been so very successful, is based upon the theory that quality at a fair price will best be provided by enlightened entrepreneurs pursuing their self-interest – to produce products which will be selected from among competing products. The interest of a proprietor of an educational institution coincides with the interest of the student – to provide quality education at a fair price. There is no inherent virtue in a nonprofit system. As Dr. Milton Friedman observed, the government bureaucrats in the Soviet Union are all working for nonprofit institutions, but that does not mean that the interest of the Soviet public is being served. (J.A. 209-17, see also Coleman, J.A. 79, Elliott, J.A. 107-08, Howard, J.A. 146).

The most serious threats to academic freedom and the decisional process come from public control of institutions, which is increasing rapidly. The greatest assurance of academic freedom is a great diversity of competing institutions. (Coleman, J.A. 79, O'Neill, J.A. 333, Friedman, J.A. 209).

(c) Responses to second hypothetical question setting forth Middle States' reasons.

(1) *Argument that a proprietary will not devote total resources to educational program.* The important question is not whether *total* resources are devoted to the educational program – but whether *adequate* resources are used. The important consideration is the program itself, and the only way to determine its quality is to evaluate the institution. (J.A. 14, 335, 432). Furthermore, no institution devotes its *total* resources to the educational program. Resources are diverted in many different ways, such as inefficiency, athletics, reduced teaching loads, maintaining profitable courses (*e.g.*, night law schools) to subsidize less profitable departments. The profit motive is a compelling force toward efficiency, which ensures *effective* use of resources. Thus, the objective to make a profit is a virtue – not a vice. An institution can not make a profit unless people are willing to pay for it – and they will not pay for it if it is inferior (*e.g.*, Thomas Edison and Alexander Graham Bell were not working for nonprofit organizations, but they made a great contribution to society, even though *total* resources were not allocated). It is not necessary to devote totality of resources to the public interest in order to serve the public interest. Doctors, lawyers, professors, engineers all seek a profit for themselves while performing vital public functions. (J.A. 44, 82, 107, 147, 218-22, 355-56, 432, 433).

(2) *Argument that a proprietary institution inherently lacks continuity.* Nonprofit institutions give no assurance of continuity. They can change radically overnight with the hiring of a new president, the election of a new school board, the election of a new governor. In volatile times such as these, a student demonstration can change an institution's character overnight. Furthermore, it serves the proprietor's interest to maintain continuity, since a substantial

change in the institution's character might hazard accreditation and reputation, and no proprietor would want to do that. In addition, if there were a change in ownership, there are existing procedures for re-evaluation by the accreditors to determine whether the institution continues to merit accreditation. (J.A. 15, 84, 108, 148, 223, 357-58, 435-37).

(3) *Argument that tenure and academic freedom would suffer in a proprietary.* A proprietary institution can have the same high standards of tenure, academic freedom, and faculty relations as a nonprofit institution. It need only be evaluated to see if it does, and such evaluation would be no more difficult than at a nonprofit institution. Indeed, the most serious threats to academic freedom and the position of the faculty come from increasing state control of higher education. A proprietary institution would have to compete in the market place for faculty and would have to maintain good relations with its faculty and give it adequate conditions of employment in order to produce an effective program. An evaluating team can tell if the faculty occupies an appropriate position (J.A. 16, 109-10, 149, 224, 336, 359-60).

(4) *The argument that proprietors might be unwilling to supply financial data.* Plaintiff's experts responded to this simple proposition with a simple answer. If any institution, profit or nonprofit, refuses to supply relevant data, it should be denied accreditation. (J.A. 17, 87, 110, 149, 225, 337, 361).

(5) *The argument that proprietaries should be denied accreditation in order to protect Middle States' "independent publicly responsible institutions."* Plaintiff's experts found this argument not only unreasonable, but somewhat offensive. If existing institutions can not survive competition, they do not deserve to survive. The aim of higher education and accreditation should be to protect individuals and society – not to protect institutions. Furthermore, a proprietary institution is just as capable of being "publicly responsible" as a nonprofit institution. If it fails in its public responsibility, it will not survive, as it will be eliminated by market factors (J.A. 110, 151, 226).

(6) *The argument that donors are more likely to give to nonprofits for tax reasons.* The basic reaction to this argument was that this may be so, but what does that have to do with educational quality? If an institution can survive without charity, why should it be penalized? In order to survive without gifts, the proprietors will work harder to produce a quality program. As Dr. Friedman observed, this may mean that a proprietary institution has two strikes against it, but why would the accrediting agency throw the third strike? (J.A. 228, 18, 88, 112, 362).

(d) Response to the reasons for the proprietary exclusion set forth in the Middle States Report of January, 1969.

As observed above, the thrust of the Middle States Report of January, 1969 (P-X-104) was that proprietaries must be excluded because the profit motive is inconsistent with institutional integrity – because the desire for profit will affect the decision-making process and hinder academic freedom and pursuit of truth.

Plaintiff's experts reasoned, first, that the best way to determine whether an institution has "institutional integrity" is to take a look at it. An evaluation team can determine whether decisions are being made in an appropriate fashion. The effect of the profit motive upon the decision-making process is no more elusive than pressures felt by public and private nonprofit institutions controlled by states or religious bodies. The greatest danger to institutional integrity and the decision-making process comes from a Board of Trustees or a state legislator or governor, devoted to promotion of a particular ideology. The pressures which affect pursuit of truth at a proprietary institution are no more elusive or persistent than those pressures felt by public and private nonprofit institutions. The direct federal subsidy of higher education, in particular, places great strains upon the integrity of the decision-making process. (J.A. 21-22, 26-28, 54-56, 60-61, 80, 89, 114, 117, 153, 157, 159, 230, 338-39, 364).

2. Middle States' experts failed to demonstrate reasonableness of proprietary exclusion.

The testimony of Middle States' expert witnesses on the issue of reasonableness can be summarized in a single sentence – the profit motive is bad for higher education. Uniformly, they expressed the view that the public interest can be served only by an institution which devotes its total resources to the program and is governed by trustees with no pecuniary interest in the financial results of the operation. For the most part, their testimony followed the reasoning enunciated in Middle States' publications prior to trial (*e.g.*, P-X-10, P-X-104). Having treated these reasons in the discussion of plaintiff's expert testimony, we will not consider them in detail here. However, some of the witnesses gave reasons in support of the nonprofit criterion in addition to those set forth in Middle States' pretrial publications. It is with these that we will now deal.

(a) The claim that proprietaries could not be evaluated with the same instruments used for nonprofit institutions.

Dr. Christensen expressed the opinion that the differences between nonprofit and proprietary institutions was so fundamental that they could not be evaluated with the instruments used by Middle States (J.A. 879). He acknowledged that he had no experience with proprietaries and that the Western Association had applied standards comparable to Middle States in accrediting proprietary institutions (J.A. 910-20). He did not disagree with admissions by Albert Meder and Wilson Elkins that a Middle States' evaluation team could evaluate the important aspects of a proprietary institution (J.A. 921-39).[25] When shown the

[25] Mr. Meder testified that if Middle States evaluated a proprietary institution it could use the basic standards applied to nonprofit institutions which are set forth in "Characteristics of Excellence in Higher Education" (D-X-148, J.A. 658-59). This is the basic document containing the accreditation standards of Middle States (J.A. 618). He also admitted that an evaluating team could determine whether or not the educational program of a proprietary

(Cont'd)

instruments used in the evaluation of nonprofit institutions. Dr. Christensen could not indicate any substantive changes that would have to be made to adapt them to the evaluation of proprietaries.[26] (J.A. 940-50, J.A. 954-58).

(b) The claim that it is impossible to operate a liberal arts institution for profit.

Mr. Arthur Blum expressed an opinion that it is impossible to operate a liberal arts institution or a liberal arts program for profit (J.A. 1271). His opinion was based primarily upon his belief that the faculty could not be free in a profit-making institution (J.A. 1272-74). Commenting on this. Webster witness, Dr. Stiles, former Dean of the Schools of Education at the University of Virginia and the University of Wisconsin, said that there is nothing inherent in a proprietary institution which inhibits academic freedom and tenure and, furthermore, public nonprofit institutions contain inherent threats to academic freedom greater than the profit motive (J.A. 1490-95).

(c) Mr. Meder's views concerning the proper function of a board of trustees.

The Middle States' requirement that the institution be governed by a board representing the public interest takes on an entirely new dimension when one considers the role of such a board as defined by Mr. Meder, former Chairman of the Middle States Higher Commission. He observed that it is important that a board of trustees "hold the idea of the college in trust." To illustrate this, he cited the example of his service on the board of a private two year college

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(Footnote 25 continued)

was effective, whether or not the financial policy of the owner was appropriate for advancement of the program, whether the faculty had a proper role in the decision-making process, whether the faculty had tenure and whether the faculty was engaged in intellectual self-development (J.A. 660-63).

26 For description of "minor changes" that would have to be made in Middle States' evaluation instruments to accommodate evaluation of proprietaries, see Dr. Stiles' testimony (J.A. 1480-86, 1496-97).

when it found itself "threatened by the imminent possibility of a public institution being founded in direct competition." He described how his board of trustees arranged to eliminate this source of "competition" because there was "not enough room in this geographical territory for both of them to exist." He considered this a "perfect example" of the proper function of trustees. (J.A. 623-25).

E. Defendant Cannot Justify Proprietary Exclusion by Evidence of Finances and Operation of Plaintiff's Institution.

Defendant seeks to justify its refusal to consider Webster on the basis of evidence it introduced regarding Webster's finances and administration. (Defendant's brief, Facts, B4). It should suffice to say that this is a "bootstrap" argument since defendant knew none of these facts at the time it rejected Webster, except that it was a family owned, proprietary college. However, the speciousness of some of defendant's statements compels us to comment.

The officers' salaries, standing by themselves are meaningless – there is nothing in the record for their comparison with administrative salaries at comparable institutions. Similarly, the comparison of faculty salaries at Webster with salaries at other junior colleges is meaningless because "average" and "median" salaries are not comparable and Webster's average includes some part-time faculty, while there is no evidence of whether the figures for other junior colleges include part-time.

The insinuation that the Webster family controls the educational program through membership on the Executive Committee and the Special Administrative Committeee is contrary to uncontroverted evidence in the record. The Executive Committee, composed entirely of Websters, performs the function of the Chairman of the Board of Directors (Donald Webster Dep., J.A. 1152-53, D-X-1500). The Special Administrative Committee performs the President's function, being in charge of the "ordinary day-to-day operations of the College, including (1) appointment, discharge and general supervision of teaching personnel, and (2) determination and administration of the college's general academic policies."

Co-chaired by the Academic Dean and the Dean of the College (neither of whom is a Webster), it consists of seven members, only two of whom are Websters. (D-X-1500, J.A. 1154-56, Block, J.A. 1527-32). The faculty, not the Webster family, determines and develops the curriculum. (Block, J.A. 1533-37). The proprietary nature of Webster does not affect decisions in academic matters. (Block, J.A. 1541-44, 1545-48).

It is stated in defendant's brief that there is no faculty tenure at Webster. Lest this Court draw any adverse inferences from this fact, it should be noted that lack of tenure does not mean absence of academic freedom. Defendant admits that tenure is not a necessary condition of academic freedom (Meder, J.A. 656). That such freedom exists at Webster is well established in this record. (Block, J.A. 1533-44, 1545-63, particularly 1551-52). What is even more relevant to this case is the fact that an evaluation team could determine the existence of academic freedom, regardless of existence of tenure. (Meder, J.A. 657). Nor has lack of tenure resulted in high faculty turnover. Twenty-eight instructors have more than five years employment; 13 have more than 10 years. (P-X-173; J.A. 1562-63).

The breakdown of Webster expenditures as contrasted with nonprofit institutions is not valid and was shown to be unreliable on cross-examination of defendant's witness, Hobson. (Tr. 4675-4731). Allocations to categories such as "library," "instruction" and "administration" were made by guesswork by the witness who had never made a thorough examination of Webster's finances and, indeed, had never previously examined the financial statement of a proprietary. (J.A. 1239). His arbitrary methods are best illustrated by his failure to include Webster's profit-share payments to faculty in "instruction" expense because he regarded profit-sharing as "an improper incentive to the faculty" (J.A. 1241) and not a "proper payment to the faculty" (J.A. 1242). Clearly, he departed from proper accounting principles to pass moral judgment on the propriety of faculty participation in profit-sharing. His analysis of Webster expenses (D-X-215) was thoroughly discredited. Furthermore, the only specific, factual basis for his average breakdown of expenses for 2-year nonprofit colleges

was his study of a junior college in Puerto Rico and 28 branch campuses in Pennsylvania, which were predominantly public institutions. (J.A. 1254).

F. Middle States' Assertion that Thirty Cents Out of Every Dollar is Diverted from Webster's Students is Fallacious and Irrelevant.

In an apparent attempt to discredit the Websters as greedy profiteers, defendant asserts that thirty-cents of every dollar of "Webster's expenditures" is diverted to "proprietary status related items" and away from the educational program. Not only is the premise faulty but the conclusion is unfounded. The "thirty percent" was concocted by defense "expert" Hobson, from a review of Webster's income and expense statement for 1966-67. In D-X-215 he allocated 30.6% of "current funds expenditures" to "Proprietary Status Related Expenses: Taxes, 10.6%, Depreciation, 8%, Profit, 12%"[27] "Depreciation" is not a cash expenditure. It is an accounting device to amortize acquisition cost of physical assets and to create a reserve for their replacement. The physical assets of the college are used to support the educational program. "Profit" is not an "expenditure," but a "gain realized from business or investment over and above expenditures."[28] It is available to spend for the support or improvement of Webster's program.[29] To claim that depreciation and profit are expenditures that divert money from the program is grossly inaccurate.

The only cash expenditure that does not support the program is taxes. Of course, nonprofit institutions are tax-exempt. A large part of the financial support of such institutions comes from government assistance provided by tax revenues from taxpayers such as Webster.

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27 For discussion of Hobson's improper accounting methods used in categorizing Webster's expenditures, see preceding section of this brief (I-E).

28 Black's Law Dictionary, 4th ed., p. 1376.

29 Webster's profit has been a source of scholarships for needy students. (S. Webster, J.A. 1479(102)-(104). Also note that payments to faculty under Webster's profit-sharing plan were included in "Profit" by Hobson instead of "Instruction" expense. (J.A. 1241-42).

If Webster showed a loss, it would have no profit and pay no income taxes. Thus, all of its cash expenditures would be devoted to the education of its students. Presumably, this would obviate defendant's complaint about "diversion" of expenditures. Middle States exalts financial losses and measures an institution's success by its fiscal failure.

Even if defendant's "thirty percent" assertion were valid, it is irrelevant because there is no showing that the result is an inherently inferior program that could not meet defendant's qualitative standards of accreditation.

II. ANTITRUST: TRIAL COURT PROPERLY HELD THAT MIDDLE STATES, ACTING IN COMBINATION WITH ITS MEMBERS AND IN COMBINATION WITH FEDERATION, HAD UNREASONABLY RESTRAINED WEBSTER'S TRADE IN DISTRICT OF COLUMBIA IN VIOLATION OF SHERMAN ACT

A. There is No Indication That Congress Intended That an Educational Accrediting Association Should be Immune to the Antitrust Laws.

Middle States argues that Congress intended that its activities as an educational accrediting association should exempt it from the Sherman Act.

To state the consequences of this claim demonstrates its fallacy. If this association of educational institutions is exempt from the antitrust laws, it would be free to impose any restraint, however predatory, upon any person. Its members could set maximum faculty salaries, fix prices for text books, establish minimum tuition rates, blacklist competing institutions, and generally restrain trade with impunity.

There is no basis for Middle States' claim that Congress did not intend the Sherman Act to apply to higher education. The language of the Act is simple and clear. "Every contract, combination . . . or conspiracy, in restraint of trade or commerce in . . . the District of Columbia . . . is declared illegal." Section 3, Sherman Act, 15 U.S.C. Sec. 3. It applies to *every* contract, combination or conspiracy in restraint of trade and to "every person" who violates the statute. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334

U.S. 219, 236 (1948). When the Congress intends to exempt an organization or activity from the scope of the antitrust laws, it does so in clear and unmistakable terms. See 15 U.S.C., Sec. 17, exempting labor organizations.

Attempting to demonstrate that the Sherman Act is not applicable to its activities, Middle States urges that the *primary* purpose of the Act was to break up the large trusts and combinations formed after the Civil War. Webster concedes that the *primary* purpose of the Sherman Act was to terminate predatory practices of business and industry as they were known in the latter part of the 19th Century.

However, simply because the Sherman Act may have been *primarily* designed to control 19th Century business and industrial empires, it certainly does not follow that other restraints of trade by nonprofit associations are to be condoned. It is doubtful that the draftsmen of the statute specifically contemplated that it might someday be applied to restraints of trade by nonprofit associations such as the American Medical Association and the Joint Commission on Accreditation of Hospitals. It was, however, contemplated that the Act should prohibit *all* restraints of trade, and when such associations imposed such restraints, the courts readily held that they were within its scope. *American Medical Association v. United States*, 317 U.S. 519 (1943); *Levin v. Joint Commission on Accreditation of Hospitals*, 122 U.S. App. D. C. 383; 354 F.2d 515 (1965).

Middle States' reliance upon *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), to support its assertion of immunity is seriously misplaced. This case held only that the Sherman Act could not be used to prohibit a combination of railroad executives from seeking political benefits at the expense of the trucking industry. Prohibition of joint political action under the Act would have raised grave constitutional questions concerning the rights of citizens to petition their government. The right to petition the government is not an issue in this case.

This misplaced reliance upon *Noerr* does, however, highlight an important point concerning Middle States' asserted immunity. No "person" is immune to

the antitrust laws. The Act applies to "every person" who restrains trade. To avoid the reach of the Sherman Act, it would be necessary for a defendant to demonstrate that it was not a "person," as that word is defined in the law. Occasionally, certain *activity* may be found to be outside the ambit of the antitrust laws because it does not involve interstate commerce. See, *e.g.*, *Federal Baseball Club v. National League*, 259 U.S. 200 (1922)[30] However, Section 3 of the Sherman Act contains no requirement of restraint of interstate commerce. It proscribes restraint of trade in the District of Columbia by *every* person.

At the close of its discussion concerning congressional intent, Middle States seems to urge that the provisions of the National Defense Education Act of 1958 and the Higher Education Act of 1965 may somehow be used to cast light on the congressional intent of the draftsmen of the Sherman Act in 1890. The contention is patently untenable and need not be discussed.[31]

B. Trial Court Properly Held That This Case Involves Whether Webster is Engaged in Trade, Not Whether Middle States and Higher Education are so Engaged.

1. It is not necessary to determine whether higher education constitutes trade or commerce to hold that Middle States has restrained Webster's trade.

Middle States insists that the trial court has held that higher education is "trade and commerce," and that this is error. The trial court did not so hold,

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30 Even this sort of immunity is scarcely the wave of the future. See *United States v. International Boxing Club*, 348 U.S. 236 (1955), *Radovitch v. National Football League*, 352 U.S. 445 (1957), extending the reach of the Sherman Act to boxing and professional football. And see, *Heimbuch v. President and Directors of Georgetown College*, 251 F. Supp. 614 (D.C. D.C., 1966), holding that charitable educational institutions are no longer immune from tort liability in the District of Columbia. It appears that educational immunity in general is a dying doctrine.

31 If, on the other hand, it is Middle States' purpose to show that these unrelated laws have somehow repealed the Sherman Act as it applies to Middle States, "[i]t is a cardinal principle * * * that repeals by implication are not favored." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

as it was not necessary to reach this conclusion to hold that Middle States had restrained Webster's trade.

The District Court did state at paragraph 20 of its opinion that a question for determination was whether higher education was trade or commerce within the scope of the Sherman Act. It then discussed this question in considerable detail both factually and legally at paragraphs 20-23 of its opinion, and concluded that: "Higher education in America today possesses many of the attributes of business," and that "To hold otherwise would be to ignore the obvious and challenge reality." (Op., para. 23). The Court went no further, however. It never reached the ultimate conclusion that Middle States or higher education was engaged in trade or commerce. At that point in its opinion, the court shifted its attention to the only question requiring resolution—whether Webster's trade had been restrained. The court stated (Op., para. 24):

> "Webster rightly contends that attention should be focused on its activities, rather than the defendant's because the question is not whether the defendant association is engaged in trade, but whether plaintiff's trade has been restrained. The Supreme Court held in the third AMA case that when the organization at which the restraint is directed is in trade, it is immaterial whether the offending association is so engaged. *American Medical Association v. United States*, 317 U.S. 519, 528, 529 (1943).

The court then resolved the issue by holding that Webster was engaged in trade.

2. <u>Even though it is not necessary to reach the question, it is clear that higher education and accrediting associations are engaged in trade within the Sherman Act.</u>

If it should be necessary to determine whether Middle States is engaged in trade, it is clear that its activities do constitute "trade or commerce" under the Sherman Act. The District Court has described some of the many attributes of business possessed by higher education. (Op., para. 23). In the first AMA case, holding that the word "trade" in the Sherman Act included the

medical profession, Chief Judge Groner concluded that the effect of all English and American cases was "to enlarge the common acceptance of the word 'trade' when embraced in the phrase 'restraint of trade' to cover all occupations in which men are engaged for a livelihood." *United States v. American Medical Association*, 72 U.S. App. D.C. 12, 19, 110 F.2d 703 (1940). The rendering of services in exchange for payment constitutes "trade" under the Sherman Act. *American Medical Association v. United States*, 76 U.S. App. D.C. 70, 73, 130 F.2d 233 (1942). Middle States furnishes evaluation and accreditation services for fees. Its member institutions of higher education supply educational and auxiliary services in exchange for tuition and fees. The staff and faculty of colleges and universities certainly are engaged in their occupations for a livelihood. Thus, this activity fits into the controlling definition of trade as enunciated by this court.

This court has also held that the function of accreditation of hospitals (which includes hospitals operated by institutions of higher education) is subject to the Sherman Act. *Levin v. Joint Commission on Accreditation of Hospitals*, 122 U.S. App. D.C. 383, 354 F.2d 515 (1965). This case raised a question as to whether the activities of the Joint Commission in the District of Columbia constituted transaction of "business" under Section 12 of the Clayton Act (15 U.S.C., Sec. 22). The court readily found that, "The business of the Joint Commission is that of accrediting hospitals," and that field inspections were a necessary aspect of that business (122 U.S. App. D.C. at 385). Having determined that the Joint Commission's contacts in the District were of the requisite *degree*, the court then disposed of the Joint Commission's claim that its activity was not of a *kind* to bring it within the antitrust laws, rejecting it by a single reference to the *AMA* cases, *supra*. (122 U.S. App. D.C. at 386). Accrediting institutions which educate is no more exalted than accrediting those that heal and save life.

The Supreme Court has recognized that an educational institution has a property right in its business. *Pierce v. Society of Sisters of Holy Names*, 268 U.S. 510, 535 (1925). Congress included institutions of higher education (profit or nonprofit) in its definition of "enterprise engaged in commerce or

in the production of goods for commerce" in the Fair Labor Standards Act. 29 U.S.C., Sec. 203(s). The legislative history of the 1966 amendments to this act recognizes that colleges not operated for profit are "in substantial competition with similar activities carried on by enterprises organized for a common business purpose." (House Report No. 971, 89th Cong., 1st Sess., August 25, 1965, p. 15). Institutions of higher education, competing in commerce, are subject to federal control under the commerce clause. *Maryland v. Wirtz*, 392 U.S. 183 (1968). It is difficult to understand, under the circumstances, how Middle States can claim that institutions of higher education are not engaged in trade or commerce, as those words are used in the Sherman Act.

3. Middle States' heavy reliance upon "The Nymph" as the asserted "controlling definition of trade" is misplaced.

In *The Schooner Nymph*, 1 Sumn. 516, 517-518, 18 Fed. Cas. 506, No. 10388 (1834), Justice Story was faced with the problem of construing the Coasting and Fishery Act of 1793, which declared that any licensed ship which was employed in any "trade" other than that for which she was licensed should be forfeited. The claim was made that the word 'trade' should be used in a restrictive sense–just as Middle States urges a restrictive interpretation of that word in this case. However, Justice Story rejected the restrictive definition, saying:

> "Wherever any occupation, employment or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or learned professions, it is constantly called a *trade*."

Middle States argues that the exclusion of liberal arts from this definition immunizes it from the provisions of the Sherman Act. The argument fails for many reasons. *First*, Justice Story's comment about the liberal arts and the learned professions was dictum. He was not restricting the term "trade" to exclude the liberal arts and the learned professions–he was expanding it to include the activities of a schooner. *Second*, Middle States is not engaged in the liberal arts. It is an accrediting association. Accreditation is not a liberal art.

Third, Justice Story's dictum was not an interpretation of the antitrust laws. On those occasions when it has been used as a guide to the meaning of the word "trade" in the antitrust laws, it has been used to expand the scope of trade, not to restrict it. *Fourth*, when it was used in an attempt to restrict the meaning of the word "trade" the definition was rejected by this court.

It is true, as Middle States urges, that Justice Story's definition of trade in *The Nymph* was used as a guide to the meaning of "trade" in *Atlantic Cleaners and Dyers, Inc. v. United States*, 286 U.S. 427 (1932).[32] However, it was used to expand the scope of trade to include the labor and service involved in cleaning and dyeing, not to restrict it to special fields of endeavor. Similarly, in *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950), the Supreme Court applied *The Nymph* test, again not to *restrict* but to *expand* the scope of "trade" in the Sherman Act.

This important distinction between restriction and expansion, between a holding and dictum, was sharply highlighted when the first AMA case came before this court. *United States v. American Medical Association*, 72 U.S. App. D.C. 12, 110 F.2d 703 (1940). The trial court in that case had held members of the medical profession exempt from the Sherman Act, relying upon the exclusion in *The Nymph* of the *liberal arts or the learned professions*. Reversing this decision, Chief Judge Groner stated (72 U.S. App. D.C. at 18):

> "The learned trial judge felt that the italicized words should be regarded as an authoritative statement of the Supreme Court that the professions were not trades and therefore not within the intent of the Act. But we think this by no means follows. The Court had before it only the problem whether "trade" was broad enough to include the cleaning and dyeing of clothes, and held it was. To reinforce its reasoning, the Court quoted language which happened to exclude the learned professions, but this limitation was not responsive to the question at hand and was purely casual, and in the circumstances ought not,

32 Significantly, in the *Atlantic Cleaners and Dyers* case, the Supreme Court held that in construing the word "trade" in Section 3 of the Sherman Act, it should have a broader meaning than the same word in Section 1 of the Act. (286 U.S. at 435).

> we think, to be regarded as a proper guide in deciding the important question in this case."

This reasoning applies equally to the term "liberal arts". *The Nymph* is not a "proper guide" to restrict the scope of the antitrust laws. Significantly, in this same decision, this Court held that the word "trade" as used in the antitrust laws covered "all occupations in which men are engaged for a livelihood." (72 U.S. App. D.C. at 19). Middle States' activities fall within this definition.

4. Whether Middle States is engaged in trade or not, it is clear beyond doubt that Webster is engaged in trade.

Middle States has not contested and can not seriously contest the trial court's holding that attention must be focused upon Webster's activities rather than Middle States. The question to be resolved is not whether Middle States is engaged in trade, but whether Webster's trade has been restrained. The Supreme Court made it clear at the close of the AMA litigation that when the organization at which the restraint is directed is in trade, it is immaterial whether the offending association is so engaged. *American Medical Association v. United States,* 317 U.S. 519, 528-529 (1943).

Consequently, Middle States finds itself forced to argue that Webster–an organization which it has excluded solely because it is a corporation organized for profit–is not engaged in trade. Ironically, Middle States has assumed the burden of showing that an institution which it has excluded because it is engaged in trade is not really engaged in trade at all.

Undertaking this difficult burden, Middle States argues that Webster can not be engaged in trade. Why not? Because Webster operates a junior college, and a junior college (even if it is operated for profit) can not be engaged in trade because it is engaged in higher education, which can never be trade because education is not carried on for profit.

Although institutions of higher education are clearly engaged in trade as that word is used in the Sherman Act, it is not necessary to establish this

proposition to find that Webster is engaged in trade. Even if higher education, as practiced by nonprofit institutions, should be considered outside the realm of "trade", there is no question that the operation of a junior college by a proprietary corporation is "trade."

Middle States argues, however, that corporate form does not determine whether an organization is engaged in trade. The fact that a corporation is nonprofit does not, of course, exclude its activities from trade and commerce. *American Medical Association v. United States*, 317 U.S. 519, 528 (1943). Many cases have held quite logically that non-profit corporations may be engaged in trade because of the nature of their activity.[33] Indeed, Webster has demonstrated above that Middle States must be considered to be in trade on just this theory. However, to our knowledge, no court has ever held that a corporation organized for profit could engage in any activity which would not be defined as trade.

Commercial activity is not the only test of "trade", but when an organization is engaged in commercial activity, it is clearly conducting "trade." *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 492 (1950). Webster renders educational and auxiliary services in exchange for tuition and fees. See *Darnell v. Markwood*, 95 U.S. App. D.C. 111, 113, 220 F.2d 374 (1954). It pays all taxes customarily paid by business corporations. Its activities are deeply educational, but unquestionably commercial.

Middle States' theory that Webster is not engaged in trade or business, if valid, would preclude Webster from taking deductions on its Federal tax returns for those ordinary and necessary expenses incurred in its "trade or business." 26 U.S.C. Sec. 162.

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[33] Middle States cites *Associated Press v. Labor Board*, 301 U.S. 103, 128, 129; *In re Duty on Estate of Incorporated Council*, 22 Q.B. 279, 293; *Maryland & Virginia Milk Producers' Association v. District of Columbia*, 73 App. D.C. 399, 119 F.2d 787, 790; *LaBelle v. Hennepin County Bar Ass'n.*, 206 Minn. 290, 294, 288 N.W. 788, 790, to support the proposition that a corporation's activities determine whether it is engaged in trade. In all of these cases, courts found that nonprofit corporations were engaged in trade. In none was it held that a corporation for profit was not engaged in trade.

C. Middle States Combining With Its Members and With the Federation Constitutes a Combination Within the Meaning of the Sherman Act.

Middle States asserts that Webster failed to prove a combination or conspiracy in restraint of trade. This assertion is grounded upon two theories: (1) that intent to combine in order to restrain trade must be proved in order to prevail under Section 3 of the Sherman Act: (2) that a plaintiff must prove a concerted use of coercive power to restrain in order to prevail under the antitrust laws. Neither theory is sound.

Proof of specific intent to combine to restrain trade is not required. Defendants in antitrust cases are presumed to intend the effects upon competition which are a necessary consequence of what they consciously do. *United States v. Patten*, 226 U.S. 525, 543 (1913). It is sufficient that a restraint of trade or monopoly results as a natural consequence of a defendant's conduct. *United States v. Griffith*, 334 U.S. 100, 105 (1948). Even the noblest motives for combining will not make a combination legal if in fact that combination restrains a plaintiff's trade. "Neither the fact that a conspiracy may be intended to promote the public welfare, or that of the industry nor the fact that it is designed to eliminate unfair, fraudulent and unlawful practices is sufficient to avoid the penalties of the Sherman Act." *American Medical Association v. United States*, 76 U.S. App. D.C. 70, 86, 130 F.2d 233 (1942). Middle States seems to argue that if a group of institutions combines for a high purpose, that association is free thereafter to take any action, intentionally or unintentionally, which may restrain another person's trade. This position is clearly contrary to authority.

Middle States' second attack on the trial court's finding of the existence of a Sherman Act combination is based upon its theory that a combination can not be shown to exist without demonstration of concerted use of coercive power by member institutions. Such proof is not required. All that need be shown is that members have combined and issued a list circulated among potential customers of an excluded member and that this act tends to restrain

the trade of the excluded member. *Eastern States Lumber Association v. United States*, 234 U.S. 600, 612-614 (1914).

Middle States seems to misconstrue the purpose of evidence which Webster introduced concerning difficulties which Webster's students experienced in transferring credits. Thus, Middle States claims in Section IIIA of its brief, "There is no proof that most Middle States members don't accept Webster's credits. With regard to Middle States members, Webster was only able to show that eleven such institutions refused to accept their credits out of a total of 346 colleges and universities which are members of Middle States." The purpose of such evidence was not to show the combination, and it was not to show parallel action, it was to show that Webster's trade—its capacity to compete—had been restrained by denial of accreditation. It is not necessary, in order to establish a combination, that a plaintiff prove that each member of that combination boycotted the plaintiff.

D. Activities of This Combination in Excluding Webster From Accreditation Have Unreasonably Restrained Webster's Trade.

Middle States has a monopoly of regional accreditation in the large area which it controls. Colleges and universities compete vigorously for students, faculty and funds. Lack of regional accreditation severely inhibits Webster in its efforts to compete with members of Middle States and the other regionals. Absence of accreditation stigmatizes an institution as one of inferior quality. Consequently, graduates of unaccredited junior colleges experience great difficulty in transferring their credits to senior institutions. High school graduates are therefore advised to avoid unaccredited schools. In short, a valuable service germane to Webster's business and important to its effective competition with others has been withheld by collective action of its competitors. "That is enough to create a violation of the Sherman Act." *Silver v. New York Stock Exchange*, 373 U.S. 341, 348, f.n. 5 (1963).

Only unreasonable restraints of trade are prohibited by the Sherman Act. *Standard Oil Company v. United States*, 221 U.S. 1 (1911). Some restraints are, however, so patently unreasonable that courts hold them to be unreasonable per se. It is unreasonable per se to foreclose competitors from any substantial

market. *International Salt Co. v. United States*, 332 U.S. 392 (1947). When the members of an association gain a competitive advantage by excluding non-members, the exclusion is unreasonable per se. Absolute illegal restraint, unreasonable per se, is established when it appears that competition by a non-member is inhibited by exclusion from an association. *Associated Press v. United States*, 326 U.S. 1, 17-18 (1945), *United States v. Griffith*, 334 U.S. 100, 107 (1948), *American Federation of Tobacco Growers v. Neal*, 183 F.2d 869, 872 (4th Cir., 1950), *Silver v. New York Stock Exchange*, 373 U.S. 341, 347-348 (1963).[34]

Lack of accreditation clearly inhibits Webster's ability to compete with members of regional associations.[35] Middle States' conduct is thus unreasonable per se. The trial court declined to hold this restraint unreasonable per se, however, since the combination was "not so devoid of potential benefit or so inherently harmful" as to fall into the per se category. (Op., para. 27).[36]

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34 See also *Darnell v. Markwood*, 95 U.S. App. D.C. 111, 220 F.2d 374 (1954), holding that defendants need not even be competitors of plaintiff if their combination restrains competition between those who are competitors.

35 Middle States claims that it has not restrained Webster's trade at all, and that this is demonstrated by the fact that Webster has made profits and increased the size of its student body. The argument is patently fallacious in an anti-trust context. As shown above, a restraint of trade is shown when it is demonstrated that a plaintiff's ability to compete effectively has been inhibited by association action. The courts have never required a plaintiff in an antitrust suit to show red ink on a balance sheet. Restraint of trade does not mean destruction of trade. Restraint is established when a non-member is inhibited competitively, even though it may continue to function in business. *Associated Press v. United States*, 326 U.S. 1, 17-18 (1945).

36 Webster submits that the benefits of the combination do not exempt its action from the per se category, as the motives of an association are not material if the action is unreasonable per se. See, e.g., *American Medical Association v. United States*, 76 U.S. App. D.C. 70, 86; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173 (1948); *Fashion Originators Guild v. Federal Trade Commission*, 312 U.S. 457, 468 (1941); *Klors v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959).

The trial court then proceeded to determine whether the restraint was unreasonable in light of the facts in this case and the applicable law. The court followed the guidelines established in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918);

> "The true test of legality is whether the restraint imposed is such as merely regulates and thereby perhaps promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied: its condition before and after the restraint was imposed: the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

The trial court then reviewed the exclusionary criterion in light of defendant's objectives and found it to be unreasonable. Earlier in this brief, we have discussed the question of reasonableness in detail. This discussion need not be repeated here. It suffices to observe that when an association purports to identify all institutions of quality and elevate standards of all institutions of higher education, it is not reasonable to exclude an institution solely because of its form of organization. Exclusion from an association is justified only if the exclusion is reasonably related to that association's legitimate goals. *Chicago Board of Trade v. United States*, supra. *Deesen v. Professional Golfers Association*, 358 F.2d 165, 170 (9th Cir., 1966); see also "Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason", 66 Columbia L. Rev. 1486, 1504-1505 (1966).

III. CONSTITUTIONAL: MIDDLE STATES, IN PERFORMING ITS ACCREDITATION FUNCTION, IS ENGAGED IN QUASI-GOVERNMENTAL ACTIVITY, PERFORMING STATE ACTION IN A CONSTITUTIONAL SENSE, AND SUBJECTING IT TO DUE PROCESS AND EQUAL PROTECTION RESTRAINTS OF CONSTITUTION.

A. When a Private Association Performs Inherently Governmental Function, Its Action is State Action in a Constitutional Sense, and Its Activities are Subject to Restraints of Constitution.

The Constitution normally limits only action by the federal and state governments. However, when a private association performs a state function which is essential to governmental activity, or when it exercises powers of a governmental nature delegated to it by the state, it becomes subject to the restraints of the Constitution. Its action becomes state action in a constitutional sense, subject to the limits imposed by the due process and equal protection clauses.[37]

B. In Performing Accreditation, Middle States' Action is Inherently Governmental, Involving Function Normally Performed by Governments, and Involving Exercise of Delegated Governmental Authority to Identify Institutions of Quality.

The record amply demonstrates the deep involvement of the federal and state governments in education. The Supreme Court has summarized the government's interest in education in *Brown v. Board of Education* 347 U.S. 483, 493 (1954):

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[37] *Evans v. Newton*, 382 U.S. 296 (1966), *Terry v. Adams*, 345 U.S. 461 (1953), *Marsh v. Alabama*, 326 U.S. 501 (1946), "Judicial Control of Actions of Private Associations", 76 Harv. L. Rev. 983, 1059. See also, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir., 1963) cert. denied, 376 U.S. 938, *Smith v. Holiday Inns of America, Inc.*, 336 F.2d 630 (6th Cir., 1964).

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship."

Because of the state's vital interest in education, accreditation of institutions and maintenance of standards for such institutions is a function normally performed by the state.[38] In most countries, it is performed by a ministry of education. In the United States, the individual states undertake this function to some extent, but state standards vary widely. Because of this diversity, state accrediting standards are seldom recognized outside of the state's borders. (P-X-39, pp. 1, 5, 129-131; JA 372-74, 350-51). To fill the need for some uniform and widely recognized method of determining quality of educational institutions, accrediting associations, such as Middle States, have assumed this inherently governmental function.

Through the accreditation process, Middle States sets standards of quality and identifies those institutions which have achieved them. Furthermore, it determines in substantial measure, the nature of the curriculum and organization of private, state and federal institutions. By threatening to deny or withdraw accreditation, it tells these institutions how they should be operated, tells them when their curricula are adequate, and advises state and federal officials of actions which should be taken. Service academies of the U.S. government are told what to do with organization and curricula if they wish to remain accredited. State superintendents of education are told to toe the line drawn by Middle States. The threat to stigmatize by withdrawing accreditation ensures that its advice will be followed.

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38 The amicus brief of the American Bar Association (pp. 1, 2) tendered to this court states the case clearly: "The fact that accreditation is carried out by government agencies in Europe and elsewhere underscores the special character of these non-governmental associations in the United States."

Furthermore, Middle States and the other regionals have operated as service agencies of the federal and state governments in identifying institutions eligible to receive federal and state benefits. Recognized by the U.S. Commissioner of Education, the regionals have become the prime functional means of establishing eligibility for federal assistance. They act, in effect, as federal administrative agencies to identify institutions worthy of federal funding. Performing a similar function for the states, the regionals select those institutions which qualify for purposes of teacher certification, student loans and scholarships.

These activities of Middle States are state action in a constitutional sense. The nature of this state action is best understood by analysis of two recent opinions: *Louisiana High School Athletic Association v. St. Augustine High School*, 396 F.2d 224 (5th Cir., 1968) and *Powe v. Miles*, 407 F.2d 73 (2nd Cir., 1968). Both concern the question of state action by a privately organized entity in the field of education. The former held that action by an athletic association of public and private schools was state action.[39] The latter held that operation of a private institution of higher education was not state action. Considered together, they help to define the dimensions of state action in this context.

The Louisiana High School case held that action of a private association organized to regulate athletic competition among area high schools was state action. The distinctive characteristics of that association, which made its activities state action, were: (1) its membership included public schools, (2) its dues came partly from public schools, (3) it had power to regulate the athletic activities in which state schools were deeply involved with expenditures of tremendous time and energy, (4) it had power to discipline these public schools, (5) it exercised control over curricula by specifying the minimum number of classes per week which a coach must teach. (396 F.2d at 227-28).

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[39] See also *Kelley v. Metropolitan County Board of Education of Nashville*, 293 F.Supp. 485, 491 (M.D. Tenn., 1968), *Lee v. Macon County Board of Education*, 283 F.Supp. 194, 196 (M.D. Ala., 1968).

In *Powe v. Miles, supra,* students at Alfred University, a private institution in New York State, sought to impose constitutional restraints upon the university in connection with their suspension for refusal to obey orders about participation in a student demonstration. The court held that the university's action was not state action. The rationale of the decision was:

(1) Alfred University was not performing a "public function" of such a nature that its action became state action. To constitute a "public function" an activity must be so clearly governmental in nature that the state cannot be permitted to escape responsibility by allowing it to be managed by a supposedly private agency (407 F.2d at 80).

(2) Although the State of New York exercised some regulatory powers over educational standards at Alfred University, this power did not implicate the state in Alfred's policies toward demonstrations and discipline. Thus, the state was not involved in the disciplinary activity which injured the plaintiffs, and consequently plaintiffs could not claim that they were injured by state action (*supra* at 81).

Applying these tests, it is manifest that Middle States is engaged in state action in a constitutional sense. The state action performed by the Lousiana Athletic Association was minimal compared to that of Middle States. The Louisiana Association controlled scheduling of sports and games, with powers over curricula only to the extent that a coach's teaching activities were involved. Middle States, on the other hand, exercises power over the core of the entire educational institution – organization and curriculum. Its standards encompass every aspect of an institution – not just the locker rooms and playing fields. Every significant private and public institution in its area is subject to this power.[40]

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[40] Public institutions comprise almost one-third of defendant's members in higher education (Defendant's brief, Facts, A-1) and enroll about one-half of the students in Middle States accredited colleges (P-X-149).

Furthermore, Middle States' functions are state action as defined in *Powe v. Miles, supra. First:* Its activity is so clearly governmental in nature that the state can not be allowed to escape responsibility by delegating it to a private agency. The inherent governmental nature of accreditation is best illustrated by the fact that the Federal government has found it necessary to utilize Middle States as an administrative agency to select institutions eligible for federal assistance. *Second:* The Federal government is directly involved in the precise activity which has injured the plaintiff, accreditation of institutions of higher education.

Since 1952, the U.S. Commissioner of Education has, by statute, been required to recognize accrediting agencies and associations deemed by him to be reliable authorities as to the quality of educational institutions. The purpose of such recognition is to provide for selection of institutions eligible for federal assistance. The Commissioner has recognized Middle States and the other regionals and they have performed the function of selection through the accreditation process. The refusal to accept Webster's application occurred in the course of Middle States' exercise of its accreditation function in which the Federal government was involved.

Clearly, Middle States' actions in performing its accreditation function are state action in a constitutional sense, in accordance with the tests set forth in the two leading cases decided by federal circuit courts.

Middle States relies upon *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535 (S.D. N.Y., 1968) and *Browns v. Mitchell*, 409 F.2d 593 (10th Cir., 1969) to demonstrate that its accreditation function is not state action. Both cases involved attempts to impose constitutional restraints upon private educational institutions on a theory that the function of education was, *per se*, state action. Webster has not made this claim.[41] As noted above,

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[41] Cf. *Greene v. Howard University*, 271 F. Supp. 609 (D.C. D.C., 1967), rem. ___ U.S. App. D.C. ___, 412 F.2d 1128.

the accreditation function of Middle States fits squarely into the requirement of *Grossner* that the state be involved in the discriminatory action under constitutional attack (287 F.Supp. at 548).[42]

The *Parsons College* case,[43] relied upon by Middle States, cannot be considered persuasive. Although this decision held that a sister regional accrediting association was not performing state action in a constitutional sense, the decision was based upon a sketchy record compiled on a motion for preliminary injunction. The district court did not have the benefit of the full record of governmental function and delegation which has been developed in this case. There is no indication that the record contained any evidence demonstrating the inherently governmental nature of accreditation or the extensive power over curricula and operation of state and federal institutions contained in the present record. In fact, since *Parsons* involved a different regional association, the facts concerning exercise of governmental power through the accrediting function may have been quite different. Unlike the North Central Association, for example, Middle States is able to control curricula in three academies operated by the Federal government which train officers of the United States Armed Services.

It should be noted that Webster has never asserted that higher education is state action *per se*. It is noteworthy, however, that when a comparable question of state action by educational institutions was presented in *Guillory v. Tulane Educational Fund*, 203 F.Supp. 855 (E.D. La., 1962), Judge Wright expressed the following significant view:

> "At the outset, one may question whether any school or college can ever be so 'private' as to escape the reach

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42 Middle States also claims that *Salter v. New York State Psychological Association*, 14 N.Y.2d 100, 198 N.E.2d 250 (1964) establishes that Middle States is not performing state action. The case clearly holds that a showing of "delegation by or agency of the State" would establish state action (198 N.E.2d at 253).

43 *Parsons College v. North Central Association*, 271 F.Supp. 65 (N.D. Ill., 1967).

> of the Fourteenth Amendment. In a country dedicated to the creed that education is the only 'sure foundation . . . of freedom, . . . without which no republic can maintain itself in strength,' institutions of learning are not things of purely private concern . . . No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution. Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes? . . ."

In deciding the constitutional issue, it is not necessary for this court to adopt the above view that every college is subject to constitutional restraints. Defendant's activities are so deeply involved in governmental action that the court need only hold that the function of regional accreditation, as practiced by Middle States, is state action. As this court observed in *Greene v. Howard University*, _____ U.S. App. D.C._____ , 412 F.2d 1128 (1969), "the amenability to constitutional commands of what was once widely assumed to be purely private activity is a fluid and developing concept." 412 F.2d at 1131, n. 2. At its present state of development, this concept makes Middle States amenable to the commands of the Constitution.

C. Middle States' Exclusion of Webster Solely Because of its Proprietary Status Violates Webster's Constitutional Rights to Due Process and Equal Protection of the Law.

Constitutional due process requires that action taken subject to constitutional restraints may not be arbitrary, capricious, discriminatory or unreasonable.[44] Such action must be rationally and substantially related to the legitimate

[44] A statutory discrimination against nonprofit corporations in comparison to profit corporations has been declared unconstitutional as an arbitrary classification based on an irrational distinction. *Smith v. Ladner*, 288 F.Supp. 66 (D. Miss., 1968).

object sought to be attained.[45] Any governmental classification which discriminates against a party's exercise of a constitutional right is an unconstitutional denial of the equal protection of the law, unless it is shown to be necessary to promote a compelling governmental interest.[46]

Webster's right to operate an educational institution is a property right guaranteed by the Constitution. Operation of a proprietary educational institution is "a kind of undertaking not inherently harmful, but long regarded as useful and meritorious." In the absence of "peculiar circumstances or present emergencies which demand extraordinary measures," and absent evidence of record to show failure to discharge their obligations, this right may not be abridged by state action. *Pierce v. Society of Sisters of Holy Names*, 268 U.S. 510, 534-535 (1925).

A discriminatory exclusion without evidence to justify it must be found unreasonable. When a Catholic school and a *proprietary* military academy combined to attack an Oregon law requiring all children to attend public schools, the Supreme Court found exclusion of these schools unreasonable and unconstitutional, observing:

> "Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State." *Pierce v. Society of Sisters of Holy Names*, *supra*, at 534.

Similarly, the record in this case contains no evidence of deficiency in proprietary education. It contains, at most, conjecture that educational quality might suffer in a proprietary institution. This conjecture, grounded on nothing

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45 *Lapides v. Clark*, 85 U.S. App. D.C. 101, 102, 176 F.2d 619 (1949); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *McGowan v. Maryland*, 366 U.S. 420 (1961).

46 *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

but prejudice and speculation, does not satisfy the requirements of the Constitution.[47]

The undertaking to teach in an educational institution is really much more than a property right – it is a vital right guaranteed by the First Amendment. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Middle States has adopted a discriminatory exclusion which severely inhibits the plaintiff's exercise of its constitutional rights. Laws restraining the constitutional right to travel have been stricken by the Supreme Court, holding that any classification which penalizes the exercise of that right is unconstitutional, unless shown to be necessary to promote a compelling governmental interest. *Shapiro v. Thompson*, *supra*, at 634. Clearly, the right to educate students, and the property rights associated with the conduct of an institution of higher education, are at least as vital as the right to travel.[48] The undertaking to teach requires particularly vigilant protection of constitutional freedoms. "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). The right to teach in a manner which cannot reasonably be regarded as harmful, is within the "liberty" assured by the due process clause of the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). See also, "Developments

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47 In Part I of this brief, we have dealt with the question of reasonableness at length, since it must be considered under all three theories argued by Webster. Details of this argument are not repeated here.

48 The genesis of the constitutional right to travel, and the impact of state welfare laws upon the exercise of that right, were sharply questioned in dissents to *Shapiro v. Thompson*, *supra* (394 U.S. at 645-677).

in the Law, Academic Freedom", 81 Harv. L. Rev. 1045 (1968). This right is a protected liberty under the Fifth Amendment.[49]

A brief analogy is helpful to bring the constitutional question into sharper focus. If the federal government decreed that institutions of higher education could use only those textbooks printed by nonprofit organizations, and if the reasons for this decree were comparable to those of Middle States,[50] it would be found unconstitutional. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236 (1968). Cf. *Epperson v. Arkansas*, 393 U.S. 97 (1968), declaring unconstitutional a state law forbidding selection of or teaching from textbooks teaching Darwinian theory. The principles in the instant case are identical. The exercise of the precious freedom to teach has been restrained by discriminatory state action. This cannot be tolerated in a society protected by the Constitution.

IV. COMMON LAW: TRIAL COURT PROPERLY HELD THAT ACCREDITATION BY MIDDLE STATES IS NECESSARY IF WEBSTER IS TO SUCCESSFULLY CONTINUE TO OPERATE AS A JUNIOR COLLEGE, AND THAT PUBLIC POLICY REQUIRES THAT MIDDLE STATES' POWERS BE EXERCISED REASONABLY.

Judicial intervention into the affairs of a private association is appropriate when that association has become so powerful that membership is either an economic necessity or a requisite to the successful continuation of a chosen occupation. Public policy requires that the actions of such an

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[49] The Fifth Amendment forbids arbitrary and discriminatory classification and denial of equal protection. *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Shapiro v. Thompson*, 394 U.S. 618 (1969). See also *Lapides v. Clark*, 85 U.S. App. D.C. 101, 102, 176 F.2d 619 (1949).

[50] i.e., the profit motive creates an inherent conflict between profits and excellence; only a board of trustees can be trusted to protect the public interest in these vital books; a publisher must devote its total resources to the advancement of its textbook program.

association must be exercised in a reasonable manner. *Falcone v. Middlesex County Medical Society*, 34 N.J. 582, 170 A.2d 791 (1961), "Judicial Control of Action of Private Associations," 76 Harv. L. Rev. 983 (1963).[51] Tangible economic loss is not required to justify action by the courts to protect the public interest in the actions of such powerful associations. *Higgins v. American Society of Clinical Pathologists*, 51 N.J. 191, 238 A.2d 665 (1968).

Middle States misconstrues the extent of association power required to warrant judicial intervention. It claims that such intervention is justified only if association membership is an "economic necessity" and only if Middle States has monopoly power to preclude Webster from conducting a junior college. The error in Middle States construction of the law is shown in the very passage which it has quoted from the *Falcone* opinion. In asserting its jurisdiction over the Middlesex Country Medical Society, the New Jersey Supreme Court held that judicial intervention was warranted because this association had the power to "preclude [Falcone] from successfully continuing in his practice . . . " (170 A.2d at 799). A plaintiff need not be destitute or driven from business to prevail against an association under the common law. *Higgins v. American Society of Clinical Pathologists, supra.* A recent persuasive opinion holds that no finding of economic necessity is required to support judicial intervention in association activity, and that the applicant's measure of success in his profession is irrelevant. A showing of deprivation of advantage is all that is required. *Pinsker v. Pacific Coast Society of Orthodontists*, 75 Cal. Rptr. 712, 716-717 (1969).

Accreditation by Middle States is necessary if Webster is to successfully continue as a junior college. As a minimum qualification for acceptability and respectability in the academic community, regional accreditation is essential to attract the better students and to transfer them to senior colleges without

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[51] Cf. *Green v. Obergfell*, 73 U.S. App. D.C. 298, 307, 121 F.2d 46 (1941), *English v. Cunningham*, 106 U.S. App. D.C. 70, 74, 269 F.2d 517 (1959).

difficulty. Profits, therefore, are not the sole test of success in the operation of a junior college, as Middle States claims. As long as it is stigmatized, is unable to attract the better students and has difficulty transferring its graduates, Webster cannot be considered successful. Moreover, the interests of the students, like the patients of Dr. Falcone, must be taken into consideration. They are forever disadvantaged by the stigma of having attended an unaccredited school. This disadvantage is in no way alleviated by the fact that the school has made profits. Can a junior college be said to be successful if it is precluded, through lack of accreditation, from serving the best interests of its students?

In *Falcone*, the New Jersey court was dealing with an association exercising powers remarkably similar to those of Middle States. Referring to this power, it stated (170 A.2d at 799):

> "Public policy strongly dictates that this power should not be unbridled but should be viewed judicially as a fiduciary power to be exercised in reasonable and lawful manner for the advancement of the interests of the medical profession and the public generally."

The court found that the public policy of the state was expressed in its unrestricted grant of a license to practice medicine and surgery. When the state has expressed its public policy by the grant of a license to pursue a chosen profession or business, this expression of public policy must be given great weight by courts in reviewing that association's actions. *Falcone v. Middlesex County Medical Society*, *supra*.

The District of Columbia has expressed its public policy by issuing Webster a license to award degrees and by accrediting Webster as a junior college.[52] This expression of public policy in the District of Columbia is

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[52] As shown in *Kraft v. Board of Education for the District of Columbia*, 247 F.Supp. 21 (D.C.D.C., 1965), the Board of Education exercises its licensing power to protect the public interest in the high standards and "high purposes of educational institutions that have the power to confer degrees". (*supra* at 25).

frustrated by Middle States' refusal to even consider Webster for accreditation. The public interest in education requires that Middle States conform its standards to accommodate this expressed public policy. At a minimum, it must at least consider the merits of Webster's institution and evaluate the junior college to determine whether it warrants Middle States' stamp of academic respectability.

V. TRIAL COURT PROPERLY HELD THAT INJUNCTIVE RELIEF WAS APPROPRIATE IN THIS CASE

Middle States claims that Webster is not entitled to injunctive relief, arguing that there is no showing of irreparable injury. The trial court properly concluded that continued violation of the antitrust laws and of Webster's rights under the Constitution and the common law would cause Webster irreparable injury.[53] This conclusion is supported by numerous findings of fact concerning harm from lack of regional accreditation (FF 24, 52, 53, 57, 58, 59, 62). The "irreparable harm" caused by lack of accreditation was recognized in *Parsons College v. North Central Association, supra* at 69, although the injunction was denied for other reasons. The nature of the injury caused by this stigma is so self-evident it is surprising that Middle States denies the injury.

To justify injunctive relief under Section 16 of the Clayton Act (15 U.S.C. §26), it is not necessary to demonstrate irreparable injury. It is enough to demonstrate a dangerous probability of loss or damage personal to the plaintiff. *United States v. Borden Company*, 347 U.S. 514, 518 (1954). *Bedford Cut Stone Company v. Journeymen Stone Cutters Association*, 274 U.S. 37,

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53 The trial court properly ignored Middle States continued fascination with the fact that Webster has operated profitably without accreditation. This tenuous theory that Webster has not been damaged because it has made a profit is most irrelevant. Middle States seems to claim that a plaintiff lacks standing to sue under the antitrust laws or to protect its constitutional rights until it starts losing money. Injury does not mean destruction of profits.

54 (1927). This dangerous possibility is manifest when an institution is branded as inferior, is unable to compete effectively for students, and is denied federal benefits to its students.

Injunctive relief is, of course, the preferred remedy to require a private association performing state action to protect a constitutional right. *Louisiana High School Athletic Association v. St. Augustine High School, supra.* Similarly, when a private association fails to use its fiduciary power in the public interest, the only remedy adequate to compel action in the public interest is an injunction. *Falcone v. Middlesex County Medical Association, supra.*

Seeking to establish that its injury outweighs that of Webster, Middle States claims that an injunction "will sound the death knell of the voluntary cooperative approach to improving higher education." (Defendant's brief, Sec. I). Similar dramatic appeals were rejected by the trial court. The short answer to such cries of doom is that this cooperative, voluntary approach may continue very effectively – and that as long as Middle States refrains from unreasonable restraints of trade and respects constitutional rights it will not be troubled by any court.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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ADDENDUM

Statutes Involved

Section 120, Title 31 of the D.C. Code (1967 ed.) provides:

> The Board of Education shall be, and is hereby, authorized and empowered to accredit junior colleges operating within the District of Columbia: Provided, That the entrance requirements of such junior colleges be not less than high-school graduation, and the number of semester hours required for the title Associate in Arts or Associate in Science be not less than sixty, and the number and character of the courses offered and the number and qualifications of the faculty be reasonable, and the institution be possessed of suitable classroom, laboratory, and library equipment.
>
> Accreditation by the Board of Education of the District of Columbia shall have the same force and effect as is usual in the case of accreditation by the various accrediting agencies of the several states of the Union.

Section 415, Title 29 of the D.C. Code (1961 ed.) provides:

> No institution heretofore or hereafter incorporated under the provisions of this chapter shall have the power to confer any degree in the District of Columbia or elsewhere, nor shall any institution incorporated outside of the District of Columbia or any person or persons individually or as a partnership or association or otherwise, undertaking to confer any degree, operate in the District of Columbia, unless under and by virtue of a license from the Board of Education of the District of Columbia, which before granting any such license may require satisfactory evidence –
>
> 1. That in the case of an individual or any unincorporated group of individuals he, or a majority of them, or in the case of an incorporated institution, a majority of the trustees, directors, or managers of said institutions are persons of good repute and qualified to conduct an institution of learning.

2. That any such degree shall be awarded only after such quantity and quality of work shall have been completed as are usually required by reputable institutions awarding the same degree: Provided, That if more than one-half the requirements for any degree are earned by correspondence, or extra-mural study, such fact shall be conspicuously noted upon the diploma conferred: Provided further, That no diploma shall be issued conferring a degree in medicine or any healing art, or in dentistry, for study pursued or work done by correspondence.

3. That applicants for said degree possess the usual high school qualifications at the time of their candidacy therefor.

4. That considering the number and character of the courses offered, the faculty is of reasonable number and properly qualified, and that the institution is possessed of suitable classroom, laboratory and library equipment.

Higher Education Amendments of 1968 (P.L. 90-575) (82 Stat. 1014) provides, in part:

PART C – AMENDMENTS TO COLLEGE WORK-STUDY PROGRAM

* * *

ELIGIBILITY OF PROPRIETARY INSTITUTIONS OF HIGHER EDUCATION

Sec. 139. Effective for fiscal years ending on or after June 30, 1970 –

(1) Section 443(b) of the Higher Education Act of 1965 (as amended by this part) is amended by striking out "or" before "an area vocational school", and by inserting before the period at the end thereof the following: ", or a proprietary institution of higher education (as defined in section 461(b) of this Act)".

(2) Section 444(a)(1) of such Act (as amended by this part) is amended by inserting after "work for the institution itself" the following: "(except in the case of a proprietary institution of higher education).".

* * *

PART E – GENERAL PROVISIONS RELATING TO STUDENT ASSISTANCE

AMENDMENTS EFFECTIVE UPON ENACTMENT

Sec. 151 Title IV of the Higher Education Act of 1965 is amended by inserting after part D the following new part:

"PART E – GENERAL PROVISIONS RELATING TO STUDENT ASSISTANCE PROGRAMS

"SUBPART 1 – GENERAL PROVISIONS

"DEFINITIONS

"Sec. 461. (a) For purposes of this title, the term 'State' includes the Trust Territory of the Pacific Islands.

"(b) For purposes of part C of this title and title II of the National Defense Education Act of 1958, the term 'proprietary institution of higher education' means a school (1) which provides not less than a six month program of training to prepare students for gainful employment in a recognized occupation, (2) which meets the requirements of section 801(a)(1) and 801(a)(2) of this Act, (3) which does not meet the requirement of section 801(a)(4) of this Act, (4) which is accredited by a nationally recognized accrediting agency or association approved by the Commissioner for this purpose, and (5) which has been in existence for at least two years. For purposes of this paragraph, the Commissioner shall publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of training offered.

* * *

PART F – AMENDMENTS TO NATIONAL DEFENSE STUDENT LOAN PROGRAM
(TITLE II OF NATIONAL DEFENSE EDUCATION ACT OF 1958)

* * *

ELIGIBILITY OF PROPRIETARY INSTITUTIONS OF HIGHER EDUCATION

Sec. 174. (a) Section 103(b) of the National Defense Education Act of 1958 is amended –

(1) by striking out "and also includes," in the second sentence and inserting in lieu thereof "; any proprietary institution of higher education (as defined in section 461(b) of the Higher Education Act of 1965) which includes in its agreement under section 204 of such title such terms and conditions as the Commissioner determines to be necessary to insure that the availability of assistance to students at the school under such title has not, and will not, increase the tuition, fees, or other charges to such students; and"; and

(2) by inserting after "requirements of clause (5)" in the third sentence the following: "(but meets the requirements of clause (4)".

(b) Effective with respect to fiscal years ending on or after June 30, 1969, section 203 of such Act is amended by adding at the end thereof the following new sentence: "The aggregate amount of Federal capital contributions paid for any fiscal year under this section to proprietary institutions of higher education (as defined in section 461(b) of the Higher Education Act of 1965) may not exceed the amount by which the funds appropriated pursuant to section 201 for such fiscal year exceed $190,000,000."

BRIEF OF THE MARYLAND ASSOCIATION FOR HIGHER EDUCATION, Amicus Curiae

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23351

MARJORIE WEBSTER JUNIOR COLLEGE, INC., *Plaintiff-Appellee*

vs.

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC., *Defendant-Appellant*

On Appeal From the United States District Court for the District of Columbia

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IN THE

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MARJORIE WEBSTER JUNIOR COLLEGE, INC., *Plaintiff-Appellee*

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On Appeal From the United States District Court for the District of Columbia

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BRIEF OF THE MARYLAND ASSOCIATION FOR HIGHER EDUCATION, Amicus Curiae

---

STATEMENT OF THE CASE

Middle States Association of Colleges and Secondary Schools, Inc. is a non-profit membership corporation organized for the improvement of educational institutions, relationships and services. The qualifications for membership include the requirement that prospective member institutions be non-profit organizations with a governing board representing the public interest. Membership in

the Middle States Association is popularly regarded as "accreditation", at least of the kinds of institutions Middle States represents.

Marjorie Webster Junior College is a proprietary corporation, with all of the stock held by the members of a single family, organized for educational purposes under the law of the District of Columbia.

Marjorie Webster Junior College brought this action alleging that refusal of Middle States Association to consider petitioner for membership in the Association solely on the ground that petitioner is not a non-profit organization with a governing board representing the public is a restraint of trade under Section 3 of the Sherman Act, 15 U.S.C. § 3, for which relief is available under Section 16 of the Clayton Act, 15 U.S.C. § 26; and on the ground that petitioner is entitled to the relief prayed under the United States Constitution and the common law governing the activities of private associations.

This brief of the Maryland Association for Higher Education as Amicus Curiae addresses itself only to the question whether the policy of the Middle States Association in limiting its membership to non-profit organizations is a violation of the cited sections of the antitrust laws.

QUESTIONS PRESENTED

I. Whether the fact that an organization is made up of members some of whose activities fall within a broad definition of "trade and commerce" means that all of the activities of the organization and its members "affect" trade and commerce within the meaning of the Sherman Act.

II. Whether the refusal of a membership organization of non-profit and public educational institutions to extend membership to proprietary institutions is in itself a concerted refusal to deal within the meaning of Section 3 of the Sherman Act.

ARGUMENT

I. Not All Activities of an Association Necessarily Affect Trade and Commerce Within the Meaning of the Sherman Act Even Though Some of the Activities of the Individual Members of the Organization May Be Within a Broad Definition of Trade and Commerce and Even Though the Organization's Activities May Have an Indirect Economic Effect on Non-Members.

In paragraph 23 of its opinion the the District Court observed that educational institutions engage in many activities that entail collecting and expending substantial sums of money, such as building programs, the payment of salaries, operation of dormitories and food facilities and so forth. From this the Court concluded that such institutions possessed "many of the attributes of business" and must be treated in the same manner as any other business. From this position it took the further step of concluding that all activities of such institutions must be regarded as a part of these "business operations" even though the activities in question relate immediately and exclusively to educational concerns and have nothing to do with the business activities inventoried.

While it is undoubtedly true that laudable motive or minimal direct effect cannot save an arrangement that is inherently anti-competitive, it is equally true that purpose and effect are relevant in determining whether the accused activity falls, in the first instance, within the range of interests the antitrust laws are designed to protect.

Thus, an agreement among motion picture producers and distributors to refuse collectively to deal with any distributor who would not subscribe to a standard form contract was a restraint of trade under the Sherman Act. *Paramount Famous Lasky Corporation v. United States*, 282 U.S. 30 (1930). On the other hand, an organization of motion picture producers and distributors, exercising influence on 90% of the nation's exhibitors, for the purpose

of obtaining adherence to a code of ethics, propriety and morality in the production of motion pictures did not violate the antitrust laws, *Hughes Tool Company* v. *Motion Picture Association*, 66 F. Supp. 1006 (S.D.N.Y. 1946).

Thus, the action of a combination of professional athletic teams in blacklisting a player who plays in another league is a restraint of trade, *Radovich* v. *National Football League*, 352 U.S. 445 (1957). But the action of a combination of professional athletic teams in blacklisting a player for gambling is not a restraint of trade within the meaning of the Sherman Act, *Molinas* v. *National Basketball Association*, 190 F. Supp. 241 (S.D.N.Y. 1961).

Thus, an organization of gas burner manufacturers and gas suppliers that deliberately used a testing and certifying procedure as a device to suppress competition was in violation of the antitrust laws, *Radiant Burners* v. *Peoples Gas Light and Coke Co.*, 364 U.S. 656 (1961). However, a trade association that established a testing and certifying procedure in a good faith effort to establish quality standards was not in violation of the law even though the procedure had adverse economic effects on a competitor in the industry, *Structural Laminates, Inc.* v. *Douglas Fir Plywood Association*, 261 F.Supp. 154 (D. Or. 1966).

If the antitrust laws are to apply automatically whenever two or more individuals or organizations, in combining to advance a common interest, cause some economic disadvantage to another, then these laws must amount to an enormously inclusive franchise for the regulation of joint efforts of all kinds and with all manner of objectives—from those calculated to eliminate discriminatory practices in public services to those intended to regulate publications made accessible to children.

II. The Organization and Activities of the Middle States Association of Colleges and Secondary Schools, Inc. Have None of the Characteristics Common to Arrangements Held To Be Concerted Refusals To Deal Under the Antitrust Laws.

The essence of the concerted refusal to deal is the undertaking (usually rigorously enforced) *of each individual member* of an organization or combination to refuse to deal with one outside the organization or one who has incurred its displeasure. In *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission,* 312 U.S. 457 (1941), there was identified a highly organized and firmly enforced scheme in which fashion designer members agreed individually to refrain from doing business with any retailer that failed to observe the Guild's rules and restrictions. The plan was expressly designed to deny retail outlets to a specified class of the Guild members' Competitors. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) involved a combination of a large retailer and a number of suppliers in which the suppliers agreed individually to refrain from supplying products to a competitor of the retailer-member. The plan was expressly designed to deny products to the competitor. *Radiant Burners* v. *Peoples Gas Light and Coke Co., supra*, involved an association of gas burner manufacturers and gas suppliers in which all members agreed individually to refrain from doing business with one not given the association's blessing. Refusal of gas suppliers to provide gas for use in petitioner's gas burner effectively excluded him from the market. *Cf. Florists' Nationwide Telephone Delivery Network* v. *Florists Telegraph Delivery Association*, 371 F.2d 263 (7th Cir. 1967).

No such combination, arrangement, or agreement is found in the organization or activities of Middle States Association of Colleges and Secondary Schools, Inc. As the record amply demonstrates, the Association imposes no restrictions on its members with reference to their relationships with institutions outside the Association. It neither

requires them to accept transfer credits from member institutions nor prohibits acceptance of credits from non-member institutions. The Association makes no effort to influence the policies of member institutions in the matter of acceptance of transfer credits, nor do member institutions agree, expressly or tacitly, with the Association or with each other to deal with transfer credits in any particular way.

In essence, what the appellee is asking is that the Court shall compel Middle States Association of Colleges and Secondary Schools to admit Appellee to membership because such membership would be economically advantageous to Appellee. There is no authority for such extraordinary action in the antitrust laws. The District Court placed great weight on *American Medical Association* v. *United States*, 317 U.S. 519 (1943) because of the apparent emphasis the Supreme Court there placed on effect on the non-member as opposed to the character of the activities and objectives of the Association. The focus is misdirected. What is notable about the *American Medical Association* case is that the activities of the Assocation were of the same kind as those found in *Fashion Orginators' Guild of America, Klor's* and *Radiant Burners, supra.* The indictment in that case charged that the Association coerced its member physicians to refrain from accepting employment with an outside organization, restrained them from even consulting with anyone serving the outside organization and restrained hospitals from affording facilities for the care of patients of the outside organization.

This has been the pattern of activities in all of the cases of which it can be said that the courts have, in any way, compelled an association to open its membership on the ground that the antitrust laws required such action. In *United States* v. *Terminal Railroad Association*, 224 U.S. 383 (1912) the Court took note of the systematic expenditure of large sums of money to acquire control over all rail terminal facilities in St. Louis as a factor providing insight

into "the character and purpose of the corporation which has combined all of the terminal instrumentalities upon which the commerce of a great city and the gateway between East and West must depend." 224 U.S. at 398. Similarly, in *Associated Press* v. *United States,* 326 U.S. 1 (1945), Mr. Justice Black left no question about the characteristics of the arrangement that were of antitrust concern.

> The heart of the government's charge was that appellants had by concerted action set up a system of By-Laws *which prohibited all AP members* from selling news to non-members, and *which granted each member* powers to block its non-member competitors from membership. 326 U.S. at 4 (emphasis added).
>
> * * *
>
> The joint effect of these By-Laws is to block all newspaper non-members from any opportunity to buy news from AP or any of its publisher members. Admission to membership in AP thereby becomes a prerequisite to obtaining AP news or buying news from any one of its more than twelve hundred publishers. 326 U.S. at 9.

Mr. Justice Douglas, concurring, was even more explicit in describing what he regarded as the remedial need and, accordingly, the remedial limits.

> The decree which we approve *does not direct Associated Press to serve all applicants.* It goes no further than to put a ban on Associated Press' practice of discriminating against competitors of its members in the same field or territory. 326 U.S. at 24 (emphasis added).

Even in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), the offending action was not a declination to grant petitioner full privileges of Exchange membership but a directive to individual members to terminate all business relationships with the petitioner.

On the record in the present case it hardly needs repeating that no such agreement to exclude nor practice of exclusion is found. The Association neither directs nor influences its members to refrain from dealing with non-members. There is no pattern of practice among members to refrain from dealing with non-members. There is no finding of fact nor even intimation that any such agreement or practice is present.

CONCLUSION

The District Court in paragraph 33 of its opinion refers to "accreditation" as a "significant business service". The Court here uses the term "accreditation" in a popular, almost colloquial, sense which obscures the process, the nature of the organizations involved, and the function the antitrust laws are called on to perform in the circumstances of this case.

Accurately speaking, accreditation is not a distinct service, business or otherwise, independently performed by the Middle States Association or any similar organization. Accreditation is membership in the Association. Membership in the Association is accreditation. The Middle States Association is a voluntary membership organization of non-profit and public educational institutions. It is thus made up of members which, because they are non-profit or public institutions, share common objectives and common problems. It exists for the purpose of studying and exploring the problems of such institutions and developing ways of carrying out their common objectives. The antitrust laws are here being employed to force the Association to admit to full membership institutions with significantly different problems and objectives. It is worth repeating—accreditation is not a merit badge or a seal of approval. It is membership in the voluntary membership organization, with a full voice thereafter in the formulation of principles, policies, objectives and standards of the Association and all of its members. In short, the judgment of the District

Court is that the Middle States Association must change its character and become something quite different from what it has been on the sole ground that its failure to do so deprives Appellee of an economic benefit it would like to have.

The true nature of what is at issue is dramatized by Appellee's prayer for relief. Appellee has not asked that this allegedly anti-competitive arrangement be dissolved; it has not asked that any discriminatory practices directed at it be enjoined (for there have been none); it has not asked that efforts to discourage member institutions from dealing with it be enjoined (for there have been none). Its request for relief is quite simple: It wants in. The fundamental inconsistency of this kind of a request for relief under the antitrust laws did not escape the attention of the Court in *Hughes Tool Company* v. *Motion Picture Association, supra.*

It is one thing to say that the antitrust laws prevent an organization like the American Medical Association from unduly restricting its members' private relationships with other members of the medical profession, as indeed the Supreme Court did in *American Medical Association* v. *United States, supra.* It would be quite another thing to hold that these laws require the A.M.A. to admit to full, voting, policy-making membership individuals whose standards and objectives vary from those the Association promotes on the sole ground that membership would be a significant business or economic advantage to the non-member.

Respectfully submitted.

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No. 23351

IN THE

United States Court of Appeals For the District of Columbia Circuit

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC.,
Appellant,

v.

MARJORIE WEBSTER JUNIOR COLLEGE, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE*

NORTHWEST ASSOCIATION OF SECONDARY AND HIGHER SCHOOLS, INC.

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IN THE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE*
NORTHWEST ASSOCIATION OF SECONDARY AND HIGHER SCHOOLS, INC.

BRIEF OF *AMICUS CURIAE*

With leave of the court, this brief is filed by the undersigned Northwest Association of Secondary and Higher Schools, Inc. (hereafter Northwest), as *amicus curiae* in the interest of Northwest as an entity in itself and in the interest of the various institutions of higher learning which are members of Northwest and who will be substantially affected by the decision in this case. Determination of the issues here presented will have fundamental implications both to Northwest and its members, and to the other regional evaluation and accreditation associations and their members throughout the

United States who have not been made a party to this action. This brief is filed in unequivocal support of the position taken by the appellant.

INTEREST OF THE NORTHWEST ASSOCIATION OF SECONDARY AND HIGHER SCHOOLS, INC.

A. Interest Based Upon Regional Accreditation Function and the Possible Violation of Antitrust Laws

This case presents novel and important issues of law and fact applicable to higher education in the United States, and to the regional accreditation by voluntary associations of nonprofit and public educational institutions located within the geographical confines of the various regional associations. The Northwest Association of Secondary and Higher Schools, Inc. (hereafter Northwest) is such a regional accrediting association, and the decision by this court, either in reversing or sustaining the trial court, will have a material and pervasive effect on the scope of influence and method of operation of Northwest in the area of higher education.

It has been alleged that Middle States Association of Colleges and Secondary Schools, Inc. (hereafter Middle States) and its members have formed a combination or conspiracy in restraint of Marjorie Webster Junior College, Inc. (hereafter Webster) trade in the District of Columbia, all in violation of the Sherman Act. It is further alleged that this combination or conspiracy results from the combining of the members of Middle States into an association which has acquired monopoly power over regional accreditation in this area and which is unreasonably exercising this power in such a manner so as to prevent or inhibit competition from proprietary institutions. Since

Northwest is an educational association similar in composition and function to Middle States, and since the policy of Northwest has been in the past and is at present to exclude from membership, and hence accreditation, proprietary institutions of higher learning, a decision by this court sustaining the trial court will cast the taint of possible antitrust law violation upon Northwest and its members.

B. Interest Based Upon Similar Organizational Structure and Operational Methods

A decision sustaining the trial court will directly and materially affect Middle States' organizational structure and operational methods insofar as its evaluation and accreditation function is concerned. The organizational structure and operational methods of Northwest are similar to those of Middle States. Consequently, the interest of Northwest in the matter before this court is readily apparent.

The similarities in structure, operation and purpose between Middle States and Northwest are clearly established by the following information.

Northwest is a nonprofit educational corporation chartered under the laws of the State of Washington, in November, 1968, for the improvement and development of educational institutions, relationships and services. Its predecessor was the Northwest Association of Secondary and Higher Schools, an unincorporated nonprofit association established in 1917. Northwest presently conducts a program of evaluation, accreditation and endorsement of institutions of secondary and higher education located in Alaska, Idaho, Montana, Nevada, Oregon, Utah and Washington.

The purposes for which Northwest was formed, and which were in continuation of the purposes of the predecessor unincorporated association, are exclusively educational and are directed toward developing educational policies and activities in extension and improvement of educational opportunities and services, promoting cooperative relationships among colleges and secondary schools, and developing criteria of evaluation which will continuously stimulate, evaluate and accredit vital educational effort.

These purposes, and especially the evaluation, accreditation and indorsement process, are carried on through two constituent commissions—the Commission for Accrediting Secondary Schools and the Commission for Accrediting Higher Schools, the latter of which consists of two classes of members: Group I, representatives of baccalaureate and/or degree granting institutions; Group II, representatives of other institutions of higher learning that do not grant baccalaureate and/or graduate degrees. It is the scope of influence and method of operation of the Commission for Accrediting Higher Schools which will be materially and directly affected by the decision of this court.

Each of the two Commissions of Northwest mentioned previously has the power and the duty to recommend to Northwest the necessary standards for its classes of schools, and these standards apply to those schools that attain and retain membership in Northwest. Membership in Northwest is voluntary and, in the colleges and institutions of higher learning branch, is concomitant with accreditation.

Northwest's membership includes 96 nonprofit institutions of higher education (universities, colleges, junior colleges, community colleges and seminaries). Approximately 58 of these institutions are four-year universities or colleges; 38 are junior colleges and community colleges; 2 are seminaries. Membership includes state or municipal institutions, private non-sectarian institutions, private church-related or controlled institutions; and the total approximate student enrollment in the member institutions of Northwest is 330,000 students. In addition to the members listed above, there are approximately 19 additional nonprofit institutions of higher learning which have applied for or indicated interest in becoming members of Northwest but whose membership is presently awaiting the report of the evaluation committee.

ARGUMENT

A. The Scope and Nature of Northwest's Activities Do Not Include Evaluation, Accreditation and Endorsement of Profit-Making Corporations Engaged in Higher Education

The scope and nature of Northwest's activities are identical to those of Middle States in that they do not include evaluation, accreditation and endorsement of profit-making corporations engaged in higher education. The Northwest Commission for Accreditation of Higher Schools does not accredit all post-secondary educational institutions. The Commission does have the duty, however, to accredit the schools and institutions which present applications in proper form and which are found to meet the prescribed standards. When a school or institution meets these standards, which are not arbitrary limitations but which have grown out of the nature of the

Commission's evaluative and accrediting process, the Commission must set the term of accreditation and establish the fiscal year during which the accreditation is effective.

One of the prescribed standards which schools and institutions of higher learning voluntarily applying for membership in Northwest must satisfy is that the applying institution of higher education must be nonprofit with a governing board representing the public interest. This standard evolved from a March, 1964 policy statement, issued with regard to the eligibility for accreditation by regional associations, by the Federation of Regional Accrediting Commissions of Higher Education, of which the unincorporated predecessor of Northwest was a member and of which Northwest presently is a member. Northwest has rigidly adhered to this eligibility requirement and at no time in its existence has the Northwest Commission for Accreditation of Higher Schools accredited a profit-making institution.

The reason for Northwest's rigid adherence to the aforementioned accreditation standard is founded upon the sincere and established belief, shared with Middle States and the other regional accreditation associations, that the continuous promotion of effectiveness and quality in higher education will flow from nonprofit institutions with governing boards representing the public interest, rather than from a proprietary institution which has the double goals of education *and* profit making and the primary goal being to return a profit on an invested capital. Northwest's adherence is not founded in any sense on an arbitrary precedent against or collusive bias toward proprietary institutions of higher learning.

If the accreditation of institutions of higher education was to be based solely on easily identifiable quantitative standards, such as the number of books in an institution's library and the number of Ph.D's on the faculty, it is arguable that the proprietary or non-proprietary status of an institution of higher education would not and should not be determinative of the issue of accreditation. Such is not the case, however. While quantitative factors are still recognized as important, they have little relationship to the actual quality of an institution; they do not go to the essence of institutional quality.

In the past decade or two, the various regional accreditation associations, including Northwest and Middle States, have adopted a new approach to the evaluation and accreditation of institutions of higher learning. Qualitative standards have replaced quantitative standards. Instead of being measured against quantitative minimums, an institution is measured against its own goals and its own resources; it sets the criteria by which it is to be measured by the accrediting association.

Pursuant to this qualitative approach, accreditation by Commissions of Northwest, Middle States and other accreditation associations does not represent that the institution accredited has reached a prescribed minimal plateau of academic adequacy. Nor does the accreditation process automatically stamp an institution with a certification of academic approval. The evaluation and accreditation is not based upon a quality comparison between institutions, and it is not a determination that one institution may be academically superior to another eligible or ineligible institution. What accreditation really

indicates is that an institution, through prior self-evaluation, has clearly defined and appropriate educational objectives, has established conditions under which it can reasonably be expected to attain them, appears in fact to be attaining them in a substantial measure, and should continue to do so. It guarantees to the public and to the academic community that there exists within the accredited institution an academic atmosphere which stimulates constructive self-examining criticism and which provides for a judicious distribution of the decision-making and policy-making powers to the trustees, administration, faculty and students.

Northwest emphatically contends that incorporated profit-making institutions cannot be evaluated with these standards applied in the qualitative method of determining fitness for accreditation. The dual goals of a proprietary institution—education *and* profit-making—are incompatible. The goal of quality education requires the utilization of the total resources of the institution toward fulfilling the educative process. The goal of profit-making requires the application of the resources of the institution toward what is economically efficient, whether or not such an application would be educationally efficacious. If the two goals of profit and education are both in the same institution, it is quite obvious that a question of a return on capital must be the first and primary consideration. The reason for this is because if the capital leaves the institution, the institution no longer exists for whatever secondary and tertiary function it might try to provide. The primary profit motive, which all profit organizations must necessarily have to survive, would seem to be to make the educational goal or the educational motive secondary.

B. It Would Be Impossible to Apply the Present System of Evaluation and Accreditation to Profit-Making Corporations Engaged in Higher Education, and the System Would Be Irreparably Damaged

The present system of qualitative evaluation, utilized by Northwest, Middle States and other regional accreditation associations, has been developed within the context of the nonprofit institution of higher learning. Application of this system to a profit-making educational corporation is impossible since the configuration of the profit-making corporation is critically different from that of the nonprofit institution.

A large portion of the evaluative criteria applied to a nonprofit institution is concerned with the dispersion of policy-making and decision-making powers among the trustees, president and administration, faculty and student body. The continued growth, effectiveness and vitality of higher education is dependent upon the right of these various elements making up the institution to participate in the institution's governing processes. In a nonprofit institution, each of these bodies has the right—not sufferance, but right—to make hard, binding decisions in the educational area, albeit of varying magnitudes.

Such is not the case in a profit-making corporation, especially a profit-making institution of higher learning, where the decision-making structure is much simpler. The governing body is elected by and responsible to a body outside the corporation—the owners or stockholders. The primary duty upon the governing body is to maximize the return on the capital of the stockholders. The decision to carry on business in the most profitable way possible will often conflict with the wishes of those members of

the institution, students or otherwise, who wish to have the right to influence the institution in carrying on its affairs in a manner most profitable to the educational goals of the institution, rather than the profit-making goals. The right to so participate which is found in the nonprofit institution is converted to a sufferance in the profit-making institution.

It is apparent that the qualitative criteria for evaluation are not suitable to the evaluation and accreditation of profit-making corporations engaged in higher education. This approach utilized by Northwest, Middle States and the other regional accreditation associations becomes inapplicable where a critical component of the goal of an institution is not educational, but rather is personal gain for the owners.

Northwest contends that the admission of profit-making members to the various regional accreditation associations would regularize the practice of self-aggrandizement on the part of the governing boards, and further, would result in the abandonment of the evaluative process developed over the last decade or two, with it being replaced by a process with lower standards of evaluation and accreditation.

Northwest has given deep consideration to the contemporary relevance of the nonprofit standard in the evaluation and accreditation of institutions of higher learning. Northwest feels that the standard is a reflection of the institutional integrity concept, which is the core of the contemporary approach to accreditation. The abandonment of this nonprofit standard would be destructive to this accrediting process.

C. The Sherman Act and the Common Law Restraint of Trade Concepts Are Not Applicable to Higher Education

Fundamentally, the Sherman Act is concerned with the concentration of significant economic power in the hands of private individuals to a degree that such individuals have the power to control the economic terms of trade within a particular market. The Sherman Act makes it illegal to exercise coercive economic power to restrain or eliminate competition in a particular market.

Higher education and the accreditation of institutions of higher education are not within the regulatory scope of the Sherman Act since these activities, engaged in by Northwest, Middle States and other regional education associations, are not economic in nature—they are not trade or commerce. It is well established that the subject matter of the Sherman Act is "business competition," and that it is aimed primarily to combinations having "commercial objectives."

Consequently, the Sherman Act is a wholly inappropriate instrument for regulating higher education; it was never intended for such a purpose. In industry or commerce, free competition for a commercial market, motivated by desire for profit, is deemed to be the soundest method for assuring maximum achievements. The forces which tend to produce the highest quality in education are entirely different from the forces which tend to produce the maximum achievement in industry or commerce. In education, the highest achievements have been obtained by the cooperative search for improvement by means of mutual assistance between institutions and by the continual dialogue between educators. Application of the

Sherman Act to higher education would destroy this existing cooperative relationship among institutions of higher education, and would impose and enforce between them commercial competition.

Neither the Federation of Regional Accrediting Commissions of Higher Education (hereafter Federation) nor the six regional accrediting associations, together or individually, constitute a combination or conspiracy in restraint of trade and commerce in the field of higher education in the District of Columbia or elsewhere. These bodies, which include Northwest and Middle States, are not monopolizing, or attempting to monopolize, the trade or commerce of proprietary institutions of higher education in the District of Columbia and elsewhere. The Federation and the respective regional associations were not formed, nor have they been operated, in a manner monopolizing or attempting to monopolize for nonprofit institutions the field of higher education in the District of Columbia or elsewhere.

Neither Middle States, Northwest, nor other regional education associations are Sherman Act conspiracies merely by virtue of their organization. The limitation of membership by the regional educational associations to nonprofit institutions with a governing board representing the public stems exclusively from educational considerations. This nonprofit policy is based, in part, on the inapplicability of the evaluative criteria to a profit-making corporation. This nonprofit limitation does not constitute an illegal combination or conspiracy under the Sherman Act, nor does it constitute a discrimination repugnant to the United States Constitution.

1. *The Sherman Act Was Not Intended to Regulate Higher Education and Its Application Has Been Confined by the Supreme Court to Commercial Activities.*

The Sherman Antitrust Law, enacted in 1890, was designed to break up the large trusts and other combinations which were being formed in American industry during the periods of rapid growth and prosperity following the Civil War. Reference to the background events which led to the enactment is found cited in *Standard Oil Company v. United States,* 221 U.S. 1, 50-52 (1911).

In *Apex Hosiery Company v. Leader,* 310 U.S. 469, 492-493 (1940), the Supreme Court, in a footnote, stated:

> "The history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that *'business competition'* was the problem *considered* and that the *Act was designed to prevent restraint of trade which had a significant effect on such competition.*" 310 U.S. at p. 493, Fn. 15 (Emphasis added).

In a more recent case, *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), the Supreme Court stated that a combination established for political activity was outside the reach of the antitrust laws, and that the proscriptions of the Act are tailored for the business world. 365 U.S. at p. 141.

Caution has also been demonstrated by Congress with regard to the regulation of educational standards since that regulation traditionally has been left to the states or to voluntary associations. This national policy was codified in the National Defense Education Act, 20 U.S.C. Sec. 41 (1958):

> "The Congress reaffirms the principle and declares

> that the states and local communities have and must retain control over and primary responsibility for public education . . ."

Furthermore, Congress has sanctioned the cooperative combination of educational institutions of higher education for mutual benefit. See Sec. 1201(j), "Higher Education Amendments of 1968," amending the Higher Education Act of 1965, P.L. 89-329.

Since Congress has explicitly recognized the legitimacy and value of combinations in higher education, it is apparent that Congress did not intend for such combinations to be subject to regulation by the Sherman Act.

It is also informative to note that there is a total absence of cases in which either the common law restraint of trade concepts or the Sherman Act have been applied to institutions of higher education or to an association of institutions of higher education. Nor has such an institution or association of institutions previously successfully *invoked* the common law restraint of trade concepts or the Sherman Act. This total absence of such cases is highly significant and, it is contended, precludes application of the common law restraint to trade concepts and the Sherman Act in the instant case.

2. ***Higher Education Does Not Constitute Trade or Commerce Since the Controlling Definition of "Trade" Excludes Higher Education, and the Carrying On of Higher Education Is Not a Commercial Activity.***

The trial court's holding that higher education is "trade or commerce" is novel and highly controversial, to say the least. The trial court focused on certain peripheral aspects of higher education, *e.g.*, operation of bookstores,

renting of dormitory rooms, and concluded from them that the overall nature of this highly complex and ancient activity is "trade or commerce." Opinion, para. 20, 23.

The traditional and controlling definition of "trade" was set forth in *The Schooner Nymph,* 1 Sumn. 516, 18 Fed. Cas. 506, No. 10,388 (1834) where the court stated:

> "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or livelihood, *not in the liberal arts or in the learned profession,* it is constantly called a trade." (Emphasis added)

In excluding the liberal arts from the definition of "trade," the Supreme Court precludes an application of the Sherman Act in the instant case.

In addition to the exclusionary definition of "trade" set forth in the *Nymph* case, the Supreme Court in *United States v. National Association of Real Estate Boards,* 339 U.S. 485 (1950), stated that an activity must be "commercial" before the antitrust laws can be applied to regulate that activity. That higher education is not a commercial activity is universally recognized. Education is a public service and higher educational institutions are maintained, not for private gain in the nature of a commercially oriented activity, but for the benefit of the public good.

3. *The Competitive Standards Embodied in the Sherman Act Are Irrelevant to Higher Education.*

Since the early days of the Sherman Act, the Supreme Court has recognized that the end sought to be achieved by the statute was effective competition by economic

units. *F.T.C. v. Sinclair Refining Co.*, 261 U.S. 463 (1922). In a later case, *F.T.C. v. Raladam Co.*, 283 U.S. 643 (1931), the court approved the holding in *Sinclair* and continued by squarely holding that the protection afforded by the Sherman Act ". . . presupposes the existence of some substantial competition to be affected." 283 U.S. at p. 648.

Given this goal of rivalry between contending economic units sought to be attained by the antitrust laws, it is clear that the entire regulatory scheme is wholly foreign to higher education. This is so because the relationship between colleges is cooperative, not competitive. Higher education is permeated by programs for exchanges of professors, permitting students to take courses for credit at other institutions, and generally involving pooling of resources. Such cooperative endeavors are not a hallmark of business competition, and thus to apply the Sherman Act to higher education is to engraft foreign concepts onto a system to which it is ill suited. The Sherman Act's purpose is to *preserve* the competitive relationship between business entities. The Act is not intended to *impose* competition as the relationship among institutions which have never before had competition among them.

4. ***The Mere Organization as an Association Is Not Sufficient to Prove Conspiracy or Combination Under the Sherman Act, nor Is Such a Conspiracy or Combination Established in the Random Behavior of Isolated Members of an Association.***

Under the test set forth by the trial court, plaintiffs suing under the Sherman Act will in effect be relieved of proving a combination. All they will need to show in

order to impose the sanctions of the Sherman Act will be the existence of an organizational structure, no matter what the nature of that organization and its structure might be. Opinion para. 25.

This approach flies squarely in the face of precedent. The mere fact of organization alone simply does not constitute a combination in and of itself. The issue in the context of conspiracy or combination goes beyond the existence of an organization, and even goes beyond the decision of the organization to exclude particular entities from membership in or approval by the organization. *United States v. Insurance Board of Cleveland,* 144 F. Supp. 684, 698 (1957). The real issue is whether the organization subsequently exercised a coercive power based on a monopoly position to preclude a nonmember from carrying on its activities, thus removing the nonmember as a "competitive" threat to its members. *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.,* 364 U.S. 356 (1961); *Fashion Originators' Guild of America v. F.T.C.,* 312 U.S. 457 (1941).

It is clear that the provisions of the Sherman Act are not applicable merely because Middle States, or any other regional education association, may form an educationally oriented organization, and, after forming such an organization, may choose to withhold approval of an institution of higher learning based on a membership criterion which excludes profit-making institutions. It is also clear that what Middle States, or other regional education associations, may not do, and which would be violative of the Sherman Act, assuming the Sherman Act is even applicable to higher education, is to exercise a coercive power to preclude a nonmember who fails to

qualify for membership, or who is not eligible for membership, from carrying on the activity in which it is engaged. In the instant case this would require that Middle States exert direct pressure on secondary schools directing them not to send students to Webster. No evidence was introduced establishing that such pressure was exerted by Middle States and, as a consequence, the provisions of the Sherman Act are not applicable.

The random behavior of isolated members of Middle States in rejecting credits of students transferring from unaccredited institutions, such as Webster, does not constitute a Sherman Act violation on the part of an organization to whom these isolated institutions belong. It is well established that in the absence of parallelism or of conscious parallelism, institutions who become members of a regional education association, such as Middle States and Northwest, can establish, or retain, their individual admission policies. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

CONCLUSION

The judgment of the trial court should be overruled and appellee's complaint should be dismissed in its entirety.

Respectfully submitted,

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31-5

REPLY BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23351

MARJORIE WEBSTER JUNIOR COLLEGE, INC., *Appellee,*

v.

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC., *Appellant.*

On Appeal From the Judgment of the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANT

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1. Introduction

Appellee has failed legally and factually to justify the Trial Court's findings and order. Indeed, its arguments justify reversal of the decision below and dismissal of the action with prejudice.

This is because the basic claim in support of the decision —and the underlying basis of the decision—is a politico-

economic argument. Higher education is trade and commerce because the profit motive pervades—or should pervade—all human activity.

This basic argument is not based on the facts of record. The "expert" testimony of Plaintiff's witnesses was opinion, pure and simple, clearly influenced by this philosophy. The damage attributed by Webster from lack of accreditation was not based on fact but on theory.

The Court's decision has no basis in precedent or law. In essence, it constitutes judicial legislation with respect to the antitrust laws and claims of Constitutional due process.

2. Plaintiff Seeks To Force the Court of Appeals To Legislate—Not To Adjudicate—Concerning the Application of the Antitrust Laws to Higher Education

Appellee's Brief reveals the true nature of this case. Webster's case is not a lawsuit in the ordinary sense. Webster does not seek to rectify a wrong which has caused it damage or will damage it in the future. Indeed, aside from conclusory "expert" opinion, Webster never cites any evidence demonstrating that Webster itself has been or will be damaged by Middle States' policy. Rather, Webster seeks to replace with its own commercial concepts the nonprofit ethic which underlies Middle States and higher education.

Appellee's account of the testimony given by its experts establishes that these men are fundamentally at odds with the prevailing climate in higher education and, through this case, are seeking to impose their own ideas on Middle States and higher education. The testimony of most of Webster's experts constituted a brief on the virtue of the profit-making system and the inferior status of the eleemosynary ethic in higher education.

Thus, one of Webster's experts likened the nonprofit approach to the prevailing system in the Soviet Union (Appellee's Brief, ID 1(c); Friedman, JA. 211). Another identified an

> ". . . effective coalition of enormously influential forces which is responsible for the rapid conversion of our local-initiative, private-enterprise system into a centrally-planned, centrally-operated economy."

This witness maintained that:

> "The driving element in this movement is a far-flung group of intellectual social theorists whose principal home is the college or university campus. Their views control the atmosphere and the content of the education of college students, but their views also dominate the plans and policies of many other influential agencies—the intellectual journals and the popular news magazines, the revolutionary movements of Black Power and Student Power, much of organized labor, the gigantic foundations and a very large part of the Executive Branch of the Federal Government." (Howard, JA. 167-68).

Nearly all of the Webster experts identified Federal aid to higher education as constituting the greatest single threat to the college or university. Appellee's Brief at 47. One witness stated that those who oppose the profit motive in education are "socialists" (Stiles, JA. 432, 440). All but one of the Webster experts admitted on cross-examination that their statements constituted a difference of opinion from the views held by Middle States and most educators.[1]

The record demonstrates differing expert opinions, which Plaintiff's witnesses acknowledged. Given that situation,

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[1] Howard, JA. 157, 161, 171, DX 814E, DX 184B (acknowledges his own "prejudices"; "each of us . . . victim of his own bigotry"); Stiles, JA. 445-46, 451, 6480-84; Dickey, JA. 28, 37-38; Coleman, JA. 98, 100; Elliott, JA. 123-24; Friedman, JA. 246-47; Gaige, JA. 369, 371.

Plaintiff did not sustain its burden of proof. Instead, the Court appears to have been influenced by the views of Plaintiffs' experts (see Opinion, 302 F. Supp. at 471). This flavor of the opinions expressed by Plaintiff's experts detracts from the alleged expertness expressed. The opinions of Middle States' witnesses, from a broad spectrum of American public and nonprofit education, were entitled to prevail on this record as to the reasonableness of the Middle States nonprofit criterion, and the noncommercial character of higher education.

Middle States did, and does, not seek to suppress the commercial ethic embraced by Webster or the views expressed by the Webster experts. However, Middle States submits that such views do not constitute a suitable basis for judicial action. The arguments expressed by Webster are more appropriately addressed to a legislative body.

Further, whatever the merit of the views of Webster's experts, they have limited relevance to the issue at bar. Middle States is guilty of no invidious discrimination against Webster unless no rational basis exists for the distinction Middle States has drawn between the profit-making and nonprofit institution. The thrust of the testimony of the Webster experts hardly demonstrated that no difference existed between the profit-making entity and the nonprofit institution. Indeed, these experts identified the different motivations which exist in the two types and sustained the reasonableness of Middle States' motivation and criterion.

3. Webster Has Failed To Establish Irreparable Harm

Webster attempts to paper over its total failure to show it has been or will be damaged by invoking the conclusory opinions of its experts, who, according to Webster, "uniformly recognized without difficulty the harm that would naturally be caused by lack of accreditation." Appellee's Brief, Counterstatement of Facts, A 1. Webster

cites *Parsons College v. North Central Association*, 271 F. Supp. 65 (N.D. Ill. 1967), to show that lack of accreditation causes irreparable harm. Appellee's Brief, Argument V. All of this would be unnecessary if Webster had been able to show—at the trial—that *its own operation* had been damaged.

The record proves exactly the contrary. Webster's fortunes have prospered all during the period of the alleged conspiracy. One of Webster's experts stated that a proprietary institution must enroll a regular flow of students in order to make income. (Howard, JA. 147). Figure 1 appearing on page 18 of Appellant's Brief shows that Webster, in 1968, was receiving more applications for admission than any other women's college in the District of Columbia. Webster cannot evade the requirement that it must demonstrate the *fact* of damage before it has a cause of action under the Sherman Act. Cf. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931), Appellant's Brief at 55; *Hughes Tool Co. v. Motion Picture Association*, 66 F. Supp. 1006, 1013 (S.D.N.Y. 1946). Nor can Webster, in the absence of factual evidence, make the opinions of experts, or random observations made in other cases, the basis for a mandatory injunction.

Webster invokes the specter of stigma as preventing its students from transferring to senior institutions, and thus inhibiting Webster from attracting freshman applicants. Webster would have the Court believe that most senior institutions flatly reject Webster students, or make it impossible for Webster students to transfer to them. Appellee's Brief at 9. This assertion is not supported by the record. Webster successfully transfers its students with advance standing to over 200 senior institutions throughout the United States. Appellant's Brief at 24. Only 34 institutions in the United States declined to grant

Webster students full academic credit on transfer—and this for a variety of reasons. Only eleven of these institutions were members of Middle States.

Webster claims that it has an inferior symbol in an annual publication of the American Association of Collegiate Registrars and Admission Officers (AACRAO) "due solely to lack of regional accreditation." Appellee's Brief, Counterstatement of the Facts, A 1. This is not the evidence. The publication cited is an exchange of information whereby the leading university in a particular state or in the District indicates, by symbols, how it treats credits transferred to it by a local institution. One of Plaintiff's witnesses explained the publication as follows:

> "Accreditation and transferability are not synonymous. . . . I have studied this quite carefully. The rating in that [AACRAO] book, as I understand it, from . . . Stanford University, is the experience that that university has had upon transfer, the actual record of the student who transferred." (Armstrong, JA. 141).

Webster presently has a "C" symbol in the publication, assigned to it by George Washington University. Until this year, it had a "D" symbol. The Director of Admissions of George Washington, called by Webster as a witness, stated on cross-examination that Webster's symbols were based on "experience" as used in "the broad sense" (Ruth, JA. 284). He received no directions from Middle States as to the symbol Webster should be assigned (Ruth JA. 268-69). In 1968 Webster was one of approximately 14 institutions in the United States—and the only one in the District of Columbia—with a "D" symbol. Four hundred and eighty-four institutions without accreditation had "A" or "B" symbols, and 79 accredited institutions had symbols of less than an "A" in the publication referred to (PX 44, DX 102).

Webster's failure to prove that its students cannot transfer to senior institutions because of lack of regional

accreditation is fatal to its case. A key assumption of the hypothetical questions asked Webster's experts was that "most [senior institutions] either refuse to accept credits from unaccredited institutions or require transfers from unaccredited institutions to validate their credits by examination or by satisfactory work in residence."[2] With regard to Webster, this fact was never proved.[3]

Webster's complaints about attracting students are equally without foundation. Webster does not seek to expand its student body beyond 500 students. In 1968, it had 594 applications for admission—more than any other women's college in the District of Columbia. Appellant's Brief at 17.

Webster's reference to the alleged inability of its students to obtain Federal aid is frivolous. Webster has never sought Federal aid either for itself or its students. Indeed, it has a policy to reject such aid. Appellant's Brief at 24.

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2 Of course, the credits of most institutions are accepted on a provisional basis only. Appellant's Brief at 24.

3 Webster also included in its hypothetical an assumption that Webster is "stigmatized" as a result of its ineligibility for accreditation. Yet, Webster maintained in the complaint that "it has received the esteem and respect of educators throughout the United States." Asked the factual basis of this statement on deposition, Sherwood Webster, Vice President of Webster, stated:

> "... [T]he acceptance of our students in transfer to some senior colleges throughout the country. *Which means that these colleges have looked favorably upon us, or they wouldn't accept our transfer students.*" Sherwood Webster Dep. JA. 1479(62). (Emphasis added).

Counsel for Middle States objected to the testimony of Webster's experts on the basis of a hypothetical which had no factual basis. The Court's restrictions on Defendant ought to have been applied to Plaintiff. See JA. 737: "Mr. Tayler: He [Defendant's counsel] has to stick to the facts that are in the case, Your Honor. The Court: There is no evidence in the record on that point. The objection will be sustained [to a hypothetical question to one of Defendant's experts]."

4. Empirical Evidence in the Record Does Strongly Support the Nonprofit Standard

Webster seeks to have the nonprofit standard declared unreasonable because it is not supported by "empirical evidence".[4] Appellee ignores the 75 years of experience Middle States has had (*e.g.*, Christensen, JA. 940). In addition, Webster insists that this Court cannot consider evidence introduced by Middle States concerning the operation of Webster itself, the only proprietary institution seeking relief in this Court. Compare Appellee's Brief, Argument I B with Argument I E.

The nonprofit criterion of Middle States reflects the experience its Higher Commission has had in evaluating institutions of higher education. The Commission has made its evaluations with the objective of increasing the effectiveness of the particular institution. A clear and cogent commitment to educational goals has emerged, over the years, as the single most important stimulus toward achieving educational excellence. The absence of an unqualified commitment to educational purposes has emerged as an insurmountable obstacle to achieving maximum educational effectiveness (Jones, JA 1421-22). The Commission does not measure mere adequacy, but rather seeks to stimulate institutions to their maximum effectiveness. Experience

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[4] Plaintiff's principal support for its argument is an alleged "study", made at the behest of Plaintiff's counsel, by an Office of Education official. Plaintiff's attempts in this connection to introduce strictly hearsay evidence were rejected by the Court. The witness finally stated that he did not "find any empirical data or definitive research reports on the subject" of the relationship between "quality of education and the proprietary character of an educational institution" (Proffitt, JA. 386-88). In addition to the source of the inquiry and clearly biased character of the "study", Plaintiff did not sustain any burden of proof, by this evidence, that the Middle States' criterion was unreasonable because of an alleged lack of information on the subject. Middle States would have been glad to supply information concerning the relationship between the nonprofit status of an institution and the type of education furnished, if it had been so requested. The study being secret and obviously prepared for trial, no such request was made to Middle States.

demonstrates that maximum educational effectiveness cannot be achieved absent total commitment to educational goals. The Commission therefore early determined that proprietary institutions—with their paramount commitment to profit—were not properly within its purview. (Jones, JA. 1422).

This practical experience was not the only evidence placed before the Trial Court in support of the nonprofit standard. Middle States also introduced extensive evidence concerning the actual operation of Webster. Webster, at trial, attempted to exclude all evidence concerning the operation of Webster on the ground that the nonprofit standard constituted a "class exclusion" and that Middle States could not justify the reasonableness of that exclusion by pointing out "certain alleged deficiencies, or what they call 'inherently bad characteristics' of proprietaries as they exist in our [Webster's] particular situation." (Argument of Counsel, Tr. 4609). Webster in effect maintained that the Court could not consider any evidence except what was before Middle States when Webster's application was rejected:

> "We were not turned down because . . . we had any particular conditions at the school. We were turned down solely because we were the member of a class—proprietary."

In spite of arguments by the Defendant, the Court substantially agreed with Webster:

> "I am going to allow wide latitude. But I must confess that I think we are putting a lot of things in this record that are not strictly relevant to the issues before me. But you may proceed within limits.
>
> "We have gone through extensive testimony in depositions that, *if I consider at all, it is in a very light way.*
>
> "I really do not see the materiality or relevance to the question that you are asking now. But you may proceed within limits." (Tr. 4611).

The Court's reference is to depositions taken by Middle States of the members of the Webster family and other employees at Appellee. Middle States introduced excerpts of these depositions into evidence. The Trial Court erred in failing to give full weight to this evidence concerning the internal operation of Webster. Neither the Trial Court nor this Court must limit consideration to the facts before Middle States when it declined to accept Webster's application.

This is illustrated by this Court's opinion in *Columbia Auto Loan, Inc. v. Jordan*, 90 U.S. App. D.C. 222, 196 F. 2d 568 (1952). The plaintiff there brought suit against the Superintendent of Insurance for refusing to renew Columbia's license as a policy-writing agent for insurance. The District Court held a trial *de novo* in which it considered issues not before the Superintendent when he made his decision. On appeal, Columbia alleged this as error. The Court of Appeals rejected this contention:

> "A court of equity will not use its power to produce a result contrary to public policy, and it is entitled to hear all evidence bearing on the possible consequences of its action. . . . It is entitled, that is, to hear all evidence relevant to the ultimate issue—namely, whether or not the complainant is entitled to the relief sought. If the Superintendent acted on the basis of facts A and B, and complainant contends that those facts were insufficient to warrant denial of a license, the Superintendent is not barred (assuming that the requirements of fair play and applicable procedure have been satisfied) from proving the existence of facts C and D, which in themselves or in conjunction with the other facts would support the Superintendent's action. To exclude such evidence would lead to the conclusion that the court could and should compel the Superintendent to issue a license even though facts C and D, not relied upon by him or perhaps then unknown to him, have since been established and are of such a nature that in the face of them the issuance of a license would be contrary to the public interest

and to the provisions of the statute. Such a theory is manifestly untenable." 90 U.S. App. D.C. at 225, 196 F. 2d at 571-72.

Webster was the sole proprietary institution attacking Middle States' standard. The action was not a class action. The Trial Court so held. (JA. 1232). Middle States was not free to carry out discovery at proprietary institutions not party to this suit. Facts concerning the internal operation of Webster, introduced by Middle States at trial, constitute overwhelming empirical evidence in support of the nonprofit standard.

That evidence shows, at the very least, that proprietary institutions are very different indeed in their operation from nonprofit institutions. Appellant's Brief at 21-24. These facts show a system of governance totally different from that of the nonprofit college or university. The facts reflect the owners' twin drives: to make as much money as possible out of the college and to maintain control over it.

Middle States does not maintain that all proprietaries are run as Webster is. However, Middle States does maintain that empirical evidence in this case concerning the actual operation of a proprietary institution strongly confirms the fact that these institutions are very different indeed from, and cannot be properly evaluated by criteria developed for, nonprofit institutions.

Webster has the burden to show that the Middle States' standard is unreasonable. Webster has the burden to show that empirical factual evidence supports its position. Webster never sustained, much less shouldered, this burden. It placed its dependence on the opinion of experts, none of whom had any experience whatever in a proprietary institution. Instead of seeking to prove by the operation of Webster itself that no real difference existed between the nonprofit and the proprietary, Webster tried to lower a paper curtain in front of its entire operation.

Only one witness called by either party had experience in both proprietary institutions and nonprofit institutions. That was Arthur Blum, President of Point Park College of Pittsburgh, called by Middle States as an expert. Mr. Blum had been employed at Business Training College, a proprietary institution, before that institution was sold to Point Park College, a nonprofit institution. Mr. Blum's testimony points out the fundamental operational differences that exist between a proprietary and a nonprofit institution and emphatically supports the Middle States' position. (Blum, JA. 1258-90).

5. Webster Misstates the Nature of Middle States

Through distorting the nature of Middle States, Webster seeks to lay a basis for application of Constitutional restraints.

Webster's arguments are inconsistent. On the one hand, Webster seeks to show that Middle States is a monolithic and dictatorial agency controlling the details of curriculum and administration at, among others, West Point and the Naval Academy. On the other hand, Webster seeks to show that Middle States is a "service agency" of the Federal Government, exercising delegated power to determine the recipients of Federal grants in cooperation with the United States Office of Education.[5] Both claims are made to support application of the Constitution. Neither are factually correct.

Webster cites passages from the summary minutes of the Higher Commission to establish "substantial control and power over organization and curriculum" of colleges and universities. Appellee's Brief, Counterstatement of

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[5] The argument that, because education is a government activity in countries such as Great Britain, with "ministries of education", of course, has no basis in fact. If the argument were valid, the operation of trains and buses in the United States (as in Great Britain) would constitute governmental activity.

Facts, A 15. Middle States exercises no such control. It defies common sense that the admininstration of West Point is carried out according to the dictates of a body elected by hundreds of colleges and universities in the Middle States area.

If Webster truly meant to prove this proposition, it could have called officers of West Point, or the Naval Academy, as witnesses. Most of Webster's experts were drawn from colleges which were members of a regional accrediting association. Yet not one of these witnesses said that the curriculum or organization of their institution was under the substantial control and power of Middle States or any other regional. Admissions officers in member institutions flatly denied that Middle States had anything to do with their policies.

The Webster argument constitutes a legal anomaly. Generally, in state action cases, the plaintiff attempts to show governmental control over the actions of the private defendant. Here, Webster apparently seeks to show the opposite: private control over a totally unrelated government activity—administration of the service academies.

At the same time, Webster seeks to establish Middle States as a "service agency" of the Federal Government. Appellee's Brief, Counterstatement of Facts, A 2. An examination of the relationship between the Federal Government and Middle States reveals the opposite. First, in accordance with Congressional intent, the U. S. Office of Education has explicitly recognized the voluntary non-governmental nature of Middle States and other accrediting associations. Secondly, such cooperation as does exist between any governmental agency and Middle States played absolutely no part in the particular discriminatory action complained of in this case—namely, Middle States' refusal to accept Webster's application for evaluation in 1966.

Middle States' membership, or pre-accreditation recognition by Middle States, is one way an institution can fulfill

a necessary eligibility requirement for Federal aid. Membership in any other nationally recognized accrediting agency serves the same purpose. However, in the vast bulk of programs, Congress set up alternative avenues to eligibility—the so-called "three letter" procedure or special recognition by an advisory committee appointed by the U. S. Commissioner of Education where the applicant for Federal aid is not within the scope of any established accrediting agency. See Appellant's Brief at 61, fn. 29.

This narrow band of governmental use of accreditation has in no way affected substantive decisions made by the numerous accrediting associations involved. The Federal Government has never sought in any way to interfere in the judgments of the associations. To do so would clearly violate Congressional intent. In a statement concerning the role of voluntary accreditation in the United States, Harold Howe, II, then U. S. Commissioner of Education, stated:

> "One of the distinctive features of American education is that the development and maintenance of educational standards is the *responsibility of non-governmental, voluntary accrediting associations.* The Office of Education is cognizant of the invaluable contribution which the voluntary associations have made to the development of educational quality in the Nation . . ." (DX 145) (Emphasis added).

The current validity of this policy was recognized at trial. (Proffit, JA. 1519).

Webster erroneously based its state action arguments on this narrow band of governmental use of voluntary accreditation. Congress, by placing some dependence on the already existing efforts of the educational community to set their own standards, was trying to avoid direct Federal control of higher education. In short, Congress was trying to severely limit state action—not expand it or make Middle States an agency of the Federal Government.

Legally, the "service agency" argument has no merit. Webster must show that the particular action it complained of constitutes state action. Appellant's Brief at 58. No evidence exists in the record that Middle States was acting at the direction of any governmental agency when it turned down Webster's application in 1966, nor is there any evidence that any official of a governmental agency participated in the decision.

6. Public Policy Does Not Support Webster's Position

Webster cites its licensure by the District of Columbia Board of Education and certain provisions of the Higher Education Amendments of 1968 as establishing a public policy favoring proprietaries. Appellee's Brief, Argument, IC 3, IC 5, V. This argument is unwarranted in fact and law.

The ultimate arbiter of public policy in the District of Columbia is Congress. Congress, in passing the Business Corporations Act of 1901, clearly limited to nonprofit institutions the power to grant degrees. Chapter 4 of Title 29, 29 D.C. Code §§ 401-420, is entitled "Institutions of Learning." 29 D.C. Code § 402 grants organizations incorporated under Chapter 4 the power to grant degrees. Sec. 404 of Chapter 4 states:

> "Such corporation shall hold the property of the institution *solely for the purposes of education, and not for the individual benefit* of themselves or of any contributor to the endowment thereof." (Emphasis added).

This represents the public policy of the District of Columbia. Plainly, this public policy requires that a degree-granting institution of higher education be nonprofit.

Webster is not incorporated under Chapter 4. Instead, it is incorporated under Chapter 6, 29 D.C. Code §§ 601-606, providing for the incorporation of "Charitable, Edu-

cational, and Religious Associations." Apparently, such associations may be incorporated for profit. Cf. 29 D.C. Code § 603. However, such corporations may not grant degrees. This issue was specifically decided by this Court in *National Ass'n. of Certified Public Accountants* v. *United States*, 53 App. D.C. 391, 292 Fed. 668, 670 (1923):

> "Section 575 of subchapter 1 [currently 29 D.C. Code § 402] expressly authorizes corporations created pursuant to its provisions 'to confer upon such persons as may be considered worthy of such academical or honorary degrees as are usually conferred by similar institutions.' This is the only part of the chapter which authorizes the conferring of degrees. Thus we see that, when Congress desired to give to a corporation that power, it did so in express terms. From this it must be inferred that, where it did not expressly grant such power, it intended to withhold it."

See also *Washington Chapter of American Institute of Banking* v. *District of Columbia*, 92 U.S. App. D.C. 139, 203 F. 2d 68 (1953).

The District of Columbia Board of Education simply misconstrued the law in accrediting Webster and licensing it to award the degree of Associate of Arts. Webster, as presently incorporated, has no power to operate an institution of higher education. Proprietary institutions of higher education are against the law in the District. Webster erroneously cites the mistake made by the Board as representing the public policy of this jurisdiction. Middle States asserted this point in the Court below. It was erroneously rejected. See Opinion, 302 F. Supp. at 471.

Plaintiff's citation of the Higher Education Amendments of 1968 is equally without merit. The legislative history of the College Work-Study Program and the National Defense Student Loan Program clearly indicates that proprietary institutions were included in the program in order to assist students attending *vocational* schools, not

liberal arts colleges. Thus, the House Report, Committee on Education and Labor, to accompany H.R. 15067 at 28 states:

> "H.R. 15067 proposes that students enrolled at certain *private vocational schools* such as business schools be allowed to participate in the college work-study program and the NDEA student loan program." (Emphasis added).

While the wording of the House bill was changed from "private vocational schools" to "proprietary institutions of higher education" in the bill which was enacted, the intent of Congress nonetheless remains clear. Congress, of course, has never in any act provided for aid to proprietary institutions themselves. Appellant's Brief at 61, fn. 29. The controlling Congressional policy in higher education is to avert Federal control. This is codified in numerous statutes. See Appellant's Brief at 16. Yet, in spite of the prophecies of its experts that Federal participation in higher education will lead to disaster, Webster would have this Court, by its decision, convert Middle States into a public "service agency" for the Federal Government in order to support a finding of state action. Such a decision would sanction and encourage the actual exercise of control by the Executive Branch of the Federal Government over the affairs of the regional associations—a development which would directly affront an explicit Congressional policy.

Finally, Webster argues that public policy dictates that Middle States evaluate proprietaries in order to protect the public against proprietaries with inferior programs. Appellee's Brief, Argument IA. Undoubtedly, such a need for accreditation does exist. However, Middle States could not undertake such an enterprise without betraying the public interest. Middle States is not set up to act as a public utility commission. It does not presently possess either the staff or expertise necessary to police the finances

of applicants or members operated for profit. Middle States believes that the distinctly different function of setting and enforcing standards for proprietary institutions can best and must be carried out by the proprietaries themselves. To fill this public need, they themselves should form an accrediting association. If they deem it appropriate, they should seek recognition from the Federal Office of Education as a nationally recognized accrediting agency.

7. The Relief Webster Seeks Would Irreparably Damage Middle States

The system of accreditation developed by Middle States' Higher Commission measures the applicant against the totality of the applicant's resources in the light of its own goals. This goal-oriented approach to accreditation, which requires that the applicant institution devote its total resources toward obtaining the educational objective it has established for itself, is not suitable to evaluating profit-making corporations which engage in higher education for the primary purpose of making money. Appellant's Brief at 9-15.

Webster attempts to prove two contradictory propositions: (1) that a proprietary can be evaluated by the same instruments used for nonprofit institutions (Appellee's Brief at 48) but (2) that the important question in evaluation is not whether total resources are devoted to the educational program but whether adequate resources are used. Appellee's Brief at D 1(c). The second proposition confirms the obvious. Proprietaries cannot meaningfully be evaluated under Middle States' existing criteria. Middle States' qualitative approach to evaluation and accreditation would have to be abandoned in favor of quantitative standards measuring adequacy if the Appellant is forced to evaluate proporietaries.

This is demonstrated by the statements of experts testifying on Webster's behalf. For example, Dr. Lindley Stiles, who testified for Webster in its case in chief and

was recalled as a rebuttal witness, stated on cross-examination:

> "Q. Now, if I understand you right, Doctor, what you are saying is that Middle States Association should go into a proprietary institution and, in effect, determine the adequacy of the resources that are being used by that institution to achieve the aims of the institution, whatever those aims are, so long as they have an educational quality to them?
>
> "A. Yes, I agree.
>
> "Q. Now, will you tell me how an educator or an accountant could establish a yard stick that 5 percent, 10 percent, 12 percent, 15 percent which would represent the resources not so devoted to education as being a reasonable amount?
>
> "A. Well, that would be a relatively simple job to do. I can illustrate it in different categories. You can take the category of buildings. We have pretty well thought out now the kind of buildings, the amount of space, the kind of laboratories, the kind of libraries, the number of books in the libraries, the kind of titles in the libraries that a good educational institution of a certain size doing a certain job ought to have.
>
> "Let me move to another area. We know what teachers' salaries are. We could compare to see whether or not this institution pays salaries that are competitive to see whether or not it provides perquisites to staff members that other institutions provide.
>
> "Running on down through the line, you get a pretty good estimate of whether or not this institution is making an effort comparable to that made by the good institutions of its type to provide a good educational program.
>
> "Q. *Doctor, aren't you referring to quantitative standards there?*
>
> "A. *I definitely am. . . .* * * *" (JA. 1499-1500) (Emphasis added).

See, to the same effect, Martin, JA. 1521.

In spite of these statements, Dr. Stiles maintained that, with only modest editing, the Middle States documents

relating to the evaluation process could be applied to proprietaries.

Mr. Alfred Donovan, Vice President of Seton Hall University, clearly established that present Middle States standards could not be applied to proprietaries:

"A. It would be utterly impossible for the Middle States to achieve the purposes for which it exists, . . . and at the same time make only modest changes of editing or of words in any of the other various documents.

"My contention, sir, is that all of the documents to which Mr. Styles refers—Functions of the Board of Trustees, Characteristics of Excellence in Higher Education, and these others—are written from the specific point of view that they are to be used in accrediting institutions whose total facilities and resources are used only for the benefit of that particular institution.

"Because that philosophy underlies everything which is in these documents, it would not be possible, simply by a process of modest editing, to reform them so that they could be used for the evaluation of an institution fundamentally different in many ways from the kind of institution for which they were devised.

"Q. Doctor, in the light of your answer and in the context of your answer, would any change have to be made in the purposes of Middle States Association in order to provide for consideration for accreditation of a proprietary institution?

"A. Yes, sir.

"Q. How?

"A. Well, as I have said, an equally important purpose, if I may quote the Middle States document, is to stimulate and help institutions reach their maximum effectiveness.

"It is not the purpose of Middle States simply to draw a line across some mediocre pole and say that everybody above here is accredited, and everybody below here is not.

"It is rather to serve education by enabling and encouraging and stimulating institutions to achieve the maximum effectiveness.

* * *

"Q. Let me ask you a question to follow up on that: You used the term 'maximum effectiveness.' What did you mean by that?

"A. I meant that that college is producing the best results of which it is capable within the limits of the resources which it has.

"Q. What percentage of resources are you talking about?

"A. 100-percent."

Referring to the changes suggested by Dr. Stiles, Mr. Donovan stated:

"A. I think they would change the whole philosophy of Middle States Accreditation.

"I don't think that there is any doubt that the philosophy which is contained, I submit, in the sum total of these documents, would have to be thrown out of the window entirely; that the basic purposes, the fundamental purposes, what Middle States calls itself, an equally important purpose, would have to be changed and disregarded, and these documents would have to be rewritten in the light of a new philosophy, with a different frame of reference and a different point of view than they presently are, if they were to be used, or adopted, or changed for the accreditation or evaluation of profit-making institutions." (JA. 1634-35).

Middle States' system of evaluation and accreditation is not based on mere adequacy. It is not based on quantitative standards. The fundamental premises presuppose the nonprofit, eleemosynary nature of the applicant.

To force Middle States to evaluate Webster will place Middle States in an insoluble dilemma. Middle States either will have to abandon its existing system of evaluation and accreditation, or it will have to sacrifice the integrity of its entire effort. Enforcement of the Trial Court's order

will irreparably harm Middle States and gravely damage higher education, which includes the accreditation of non-profit and public institutions.

Respectfully submitted.

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BRIEF OF AMICUS CURIAE, THE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES IN NEW JERSEY

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23351

MARJORIE WEBSTER JUNIOR COLLEGE, INC., *Appellee,*

v.

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC., *Appellant.*

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF AMICUS CURIAE, THE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES IN NEW JERSEY

INTRODUCTION

By motion accompanying this brief, The Association of Independent Colleges and Universities in New Jersey has requested permission to enter this case as Amicus Curiae.

The Association of Independent Colleges and Universities in New Jersey was organized in 1966 for the purpose of "* * * advancing higher education in New Jersey

by studying, devising and promulgating programs for the maximization of the contributions of independent colleges and universities, by fostering public interest in public policy and legislation respecting independent colleges and universities, by disseminating information relevant to this purpose to its membership * * *". Membership is open to all colleges and universities in New Jersey operated under private control which are accredited by the Middle States Association of Colleges and Secondary Schools, and organized and operated exclusively for educational purposes and are tax exempt (non-profit) as defined by the United States Internal Revenue Code, except that an institution whose primary purpose is religious training is not eligible.

The Association includes two two-year colleges—Centenary and Union; six four-year colleges—Bloomfield, Caldwell, Georgian Court, Saint Elizabeth's, Saint Peter's and Upsala; and seven institutions offering at least one program above the baccalaureate level—Drew, Fairleigh Dickinson, Monmouth, Princeton, Rider, Seton Hall and Stevens.

Only one eligible institution does not hold membership; it is a special purpose institution—Westminster Choir College—and it has, nevertheless, authorized the Association to speak for it as well as for its membership.

The fifteen member institutions enroll approximately 50,000 students—full and part-time, undergraduate and graduate. This is 95% of the enrollment in non-public institutions in New Jersey.

The primary concern of the Association is the well-being and perpetuation of the independent sector of American higher education. It has been successful in securing State tuition aid grants to assist students to attend the college of their choice, and has participated actively in the formation of the legally mandated master plan for higher education in New Jersey, which recognizes the independent colleges as an integral part of the New Jersey "system" of

higher education. As provided by law, a nominee of the Association serves on the State Board of Higher Education and the independent institutions are also represented, ordinarily by persons nominated by the Association, on the State Scholarship Commission and the New Jersey Educational Computing Center.

The Association emphasizes cooperation among its member agencies, the importance of maintaining effective and efficient educational and fiscal management, and especially of instituting a system for providing comparable statistical data, a uniform system of accounts and basic records and comparable cost figures, and the importance of cooperation in improving the quality and reputation of the independent colleges.

All of these activities, which we regard as essential to the maintenance and well-being of the independent sector of higher education, are directly contrary to the competitive emphasis in trade and commerce. In the Association's view, the declaration that higher education is to be subject to a law designed to enforce competition ultimately spells the end of quality in higher education. The enterprise of higher education is disinterested and cooperative; the business enterprise is competitive and profit-making. The Association believes these are antithetical ideals.

STATEMENT OF THE CASE

The Association of Independent Colleges and Universities in New Jersey joins in the Statement of the Case as set forth in the brief of the Appellant, Middle States Association of Colleges and Secondary Schools, Inc., and adopts same as a part of this brief.

ARGUMENT

Point One

This Amicus Joins in the Arguments of the Appellant

This Amicus, The Association of Independent Colleges and Universities in New Jersey, has reviewed in detail the brief filed by Defendant Appellant, Middle States Association of Colleges and Secondary Schools, Inc., and joins in all the arguments set forth therein and adopts same as a part of this brief. The argument set forth below is intended to supplement the argument of the Appellant.

Point Two

Higher Education Is Not Within the Purview of the Sherman Act

As pointed out in Appellant's brief, the intent and purpose of the Sherman Act was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, which would result in a public injury. It was designed to prevent restraint of trade which would have a significant effect on such competition.

Higher education is not a commercial activity and is established solely for the public good and not for private gain. A generally accepted fact, both within and without the field of education, is that tuition for the most part pays only a small portion of the cost to operate a college or university. The difference is made up of gifts and contributions.

There is no profit motive or profit making inuring to the benefit of individuals or a group of individuals who might siphon off profits under the guise of excessive salaries, fees, bonuses or otherwise. Commercial activity, on the other hand, is trade where the dominant motive is profit. All

the property and income inure to the benefit of the owners, the individual stockholders. This is true on dissolution of a business where the capital assets are divided among the owners. On the other hand, the property and capital assets, including any endowments, are considered a public trust and generally transferred to some other non-profit educational institutions. The public benefit alone is involved.

It would be well here to point up a few of the important differences in the operation of a college or university which are not found in trade or commerce.

As to accounting methods, the following excerpt found on Page 141 of *College and University Business Administration*, Revised Edition 1968, published by the American Council on Education, is pertinent:

> "Accounting in colleges and universities is the means by which financial data are made available to the controlling bodies, executive officers responsible for efficient administration, and the public. The institutions, whether publicly or privately controlled, are in the nature of public trusts. Thus, the inherent obligations for stewardship and accountability necessitate a system of accounts and reports that will ensure full disclosure of the results of their operations and of their financial position.
>
> The development of the accounting system should be governed by the form and character that the financial data need take in order to promote effective administration. However, certain principles of classification and presentation of accounting data as well as a standard terminology for institutions of higher education have come to be accepted, and colleges and universities should maintain their accounts and present their financial reports accordingly. Conformance facilitates internal administration, public understanding, and comparisons with other institutions. Since service, rather than profit, is the primary objective of educational institutions, the principles for accounting differ from

those of commercial enterprises. In commercial accounting, the emphasis is on determining net profit and net worth."

This emphasizes some of the practical problems Middle States Association of Colleges and Secondary Schools, Inc. will have if this decision stands. The procedures will have to be revamped so that they may evaluate another kind of accounting system.

The peripheral or incidental aspects of higher education relied on by the Court below in Paragraph 23 of its Opinion, are common to all enterprises. If the Court's test is correct, virtually all charitable and religious institutions would qualify as being subject to Federal Anti-Trust Laws.

The Federal, State and municipal governments recognize the difference between educational institutions and businesses and have afforded favorable legislation benefiting the educational institutions. See e.g., 26 U.S.C.A. Sec. 501; N.J.S. 15:2-1 et seq. Federal laws have encouraged private persons to contribute to the support of colleges and universities by affording income tax deductions and other tax benefits.

There has been judicial recognition of the fact that independent education performs a public service unlike a commercial enterprise. The late Chief Justice Vanderbilt of the New Jersey Supreme Court observed in the *Kimberly School v. Town of Montclair*, 2 N.J. 28, 65 A. 2d 500, 503 (1949):

> "* * * So vital to the public welfare has the education of its citizens been deemed in this State that from the earliest days of the Republic 'school houses, although not formally exempted by the tax laws in force prior to 1851, were seldom if ever assessed in any part of the State. This omission was so obviously proper and so entirely in accordance with the public sentiment that it universally prevailed, and was in fact a contemporaneous construction of the laws this court would probably have sanctioned had the question been formally

> raised.' *State* v. *Collector of Jersey City*, 24 N.J.L. 108, 120 (Sup. Ct. 1853). The education of citizens living in a democratic state and governed by a representative government has long been a subject of such fundamental public concern, by the very nature of such government, as to justify the granting of immunity from taxation to institutions of learning, for no greater threat to sound government in a democracy can be conceived of than an illiterate or uneducated electorate. So strong in the legislative mind was this salutary policy that in the enactment of the first statute in this State dealing with exemptions from taxation educational institutions were granted tax exemption regardless of whether or not the institution was operated for profit, P.L. 1851, p. 272. It was not until the passage of the Tax Act of 1903, P.L. 1903, c. 208, Art. I, § 3, that the present test of whether an educational institution was operating at a profit found its way into the law to correct selfish abuses that had arisen under the original tax exemption statute of 1851."

The Chief Justice also stated for the Court at 65 A. 2d 507:

> "* * * Of the wisdom of the legislative policy in exempting educational institutions from taxation where the profit-making motive is absent there can be no doubt. The need for enlightenment and training is as great, if not greater, today as at any time in the nation's history."

Institutions of higher education cannot "serve two masters". If proprietary, their prime purpose is profit: if non-profit, they are operated for the furtherance of education and the public good.

It would appear that Webster by its actions is more interested in profits than the public good. If Webster were truly interested in providing the best possible education and in being examined by Middle States for accreditation, it is respectfully suggested that it should then meet the requirements, change its philosophy and control and become non-profit. It would have no difficulty in being ex-

amined if it restructured its corporate entity into a non-profit educational institution. This would be very simple and has been done in other instances. If the stockholders of Webster were not inclined to make a gift to any such new entity, then it could either lease the facilities or transfer title on a mortgage arrangement.

The application of the Sherman Act to higher education must be avoided in both the interest of the public and the members of the educational community.

Only if higher education is regarded in the narrowest sense as offering specific instruction in specific fields for specific occupational or vocational purposes is a competitive profit motive justifiable at all. When the enterprise is regarded, as it must be, as society's vehicle, for the advancement of knowledge and the dispassionate examination of ideas, there must be provided a climate in which free inquiry and cooperative efforts be responsible and competent scholars are encouraged without any hampering restrictions, including the making of a profit or the fostering of competition. The enterprise of higher education is disinterested and cooperative; the business enterprise is competitive and profit-making. These are antithetical ideals.

CONCLUSION

The judgment of the trial court should be overruled and appellee's complaint should be dismissed in its entirety.

Respectfully submitted,

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31-5

No. 23351.

In the United States Court of Appeals For the District of Columbia Circuit

MARJORIE WEBSTER JUNIOR COLLEGE, INC.,
PLAINTIFF-APPELLEE.

v.

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC.,
DEFENDANT-APPELLANT.

BRIEF OF NEW ENGLAND ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS INC. AS AMICUS CURIAE

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BRIEF OF NEW ENGLAND ASSOCIATION OF COLLEGES & SECONDARY SCHOOLS INC. AS AMICUS CURIAE

PRELIMINARY STATEMENT

The New England Association of Colleges and Secondary Schools, Inc. endorses the various positions taken in its Brief by the Defendant-Appellant, Middle States Association of Colleges and Secondary Schools, Inc. Accordingly, this Brief will not repeat the arguments made by the Defendant-Appellant in support of its various positions on appeal. Instead, the purpose of this Brief is to discuss several of the issues on appeal from different, and hopefully illuminating, points of view.

SUMMARY OF ARGUMENT

I. The Sherman Act Is Not Applicable To the Field of Education

A. Higher education, which includes the policies and practices of associations of educational accreditation, does not constitute trade or commerce within the meaning of Section 3 of the Sherman Act.

B. The learned professions have traditionally enjoyed an implied exemption from the application of the antitrust laws.

II. The District Court Erred In Upholding Marjorie Webster's Constitutional Claim

A. The editorial written by Dr. J. Herbert Hollomon and relied upon by the trial judge neither supports a conclusion that the nonprofit standard is arbitrary, discriminatory and unreasonable, nor a holding that education is trade or commerce.

B. The legal structure and method of operation of Middle States militates against judicial supervision of the Association's role.

III. The Plaintiff Has Failed To Sustain Its Burden of Proving That the Restraint of Trade Is Unreasonable and Hence Illegal

ARGUMENT

I. The Sherman Act Is Not Applicable To the Field of Education

A. *Higher Education, Which Includes the Policies and Practices of Associations of Educational Accreditation, Does Not Constitute Trade or Commerce Within the Meaning of Section 3 of the Sherman Act.*

The court below, correctly recognizing the novelty and importance of its inquiry, attempted to deal with the question of whether "higher education, including the accreditation of institutions", is "trade or commerce and thus within the regulatory scope of the Sherman Act". (Opinion, para. 220). The rather vague and deceptively innocuous language of that statute has led many to conjecture that it owed its origins to "a modest measure of appeasement by the powerful business interests of the day". Areeda, *Anti-trust Analysis*, 22 (1967). Whatever its raison d'etre, its terms stated with classic simplicity the basic principle of American antitrust law: "to make of ours, so far as Congress could under our dual system, a competitive business economy". *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953). As the Supreme Court stated more than half a century after its enactment:

> "Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take."
> *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605 (1953).

This concept of workable competition, in which a great number of competitive units function independently in various defined markets, is the climate in which it was hoped American business and industry would flourish in the years following the birth of the Sherman Act. Predictably, some businesses have had more trouble than others adjusting to that climate. Nevertheless, given the nature of the commercial spirit, their survival has rarely been in doubt.

Such is not the case when the mantle of commercial competition is forced upon the unwilling shoulders of higher education. For the learned professions can only choke on this unfamiliar air. Yet the court below would have us believe that higher education has, in fact, become inundated with the very competitive spirit which it assiduously, and virtually unanimously, has disavowed at every turn. It has held that education has now become "trade or commerce" in much the same manner that a manufacturing plant is encompassed in those words.

This contention is all the more unreal when one considers that only a tiny fraction of all the educational institutions in this country are organized in a fashion that allows the realization of profits. Where in the field of education as a whole do we find the competitive businessman, who is the traditional anti-trust defendant? For, as Rostow and many other writers have so aptly noted, "The Sherman Act largely concerns the behavior of businessmen, and their plans for making as much money as possible under the circumstances of their market position". Rostow, *Monopoly Under the Sherman Act: Power or Purpose?* 43 Ill. L. Rev. 745, 771 (1949).

The Supreme Court has affirmed the above concept of the Sherman Act on many occasions. In *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, at 83 (1911), Mr. Justice Harlan, perhaps reacting to the "appeasement" theory mentioned earlier in this argument, expressed his belief that the Act was a response to

> "a deep feeling of unrest—among the people generally, a universal conviction that although human slavery had been abolished, the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of

a few individuals and corporations controlling, *for their own profit and advantage exclusively,* the entire *business* of the country, including the production and sale of the necessaries of life." (Emphasis supplied).

Almost fifty years later, the court, in *Northern Pacific Railway v. United States*, 356 U.S. 1, (1958), noted, at 4:

"The Sherman Act was designed to be a comprehensive charter of *economic liberty* aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." (Emphasis supplied).

It is not our purpose to argue with these notions of economic freedom. But to place the educator in the commercial market place is to misconstrue the role of education in our society. Education is neither trade nor commerce, nor can it function, at least as we know it, in the competitive world of such commerce. It is a field that derives its strength from its autonomy. The role of education is to teach the basic and fundamental freedoms of American life, and economic and political regulation are inimical to such a purpose. As one educator has noted, "One of the fundamental and basic traditions of this country has been the freedom of higher education from political interference and dictation". Selden, *Current National Issues in Accreditation*, 30 Junior College Journal, 534, 538 (May 1960). This tradition will be forever eradicated if education is exposed to the menacing omnipresence of the antitrust laws.

The heart of the philosophy underlying the accreditation agencies is the creation of effects which are non-economic. Their aim is academic excellence. They look not to the profit or loss column to measure the worth of their institutions, but rather to the fulfillment of potential. They deal in intangibles rather than hard cash. It is this non-profit aspect of educational accrediting agencies which "separates them from business enterprises, such as joint-stock associations, which are more susceptible to governmental regulation because of their commercial character". Comment, 52 Cornell L.Q. 104, 108, n. 30. And it is important to note that it has been the profit purpose that has constituted for the court

> "a datum—the stable ground upon which rests the existing structure of precedent for deciding cases involving business defendants. Around this familiar continent of commercial purpose, lap the waters of a sea of doubt."
>
> Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 Nw. U. L. Rev. 705 (1962), at 728.

There should be no doubt, moreover, that the abiding spirit in and between educational institutions in our country today is co-operation toward a goal of academic excellence, rather than the principle of competition which characterizes business. Of course, each academic institution feels an urge to improve itself and a pride in its achievement, but there would be little satisfaction in the educational community in seeing the "stock" of one institution rise at the expense of another.

The spirit of co-operation is apparent in many educational communities. Within the New England region, there are a number of impressive examples. In Cambridge, Massachusetts, the Joint Center of Urban Studies of the

Massachusetts Institute of Technology and Harvard University has achieved national prominence in a few short years. Can it seriously be claimed that the Center somehow represents a threat to the city planning programs at other Boston universities?

In the western part of the state, a co-operative effort between the University of Massachusetts, Smith College, Amherst College and Mount Holyoke has produced great opportunities for the members of those college communities. It should be noted, in passing, that this effort involves both private institutions and a state university.

This argument should not be interpreted as a deprecation of the competitive spirit of American business or the profit motive which it embraces, but only as an effort to illustrate that the basic elements of business life are irrelevant to traditional principles of American education.

There is no need here to repeat the cases cited by the Middle States Association in its brief to the effect that the Sherman Act should not be applied absent a showing of some form of commercial restraint. These opinions, which include *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213, and *Apex Hosiery Company* v. *Leader*, 310 U.S. 469, 495 (1940), merely reinforce the argument, developed above, that the field of education is incompatible with the concept of trade or commerce as it has been applied in the area of antitrust. To borrow the language of one commentator, litigation over such a matter is "an affront to the notion of an antitrust law confined by nature to the arena of commercial conflict between entrepreneurs mutually contending for economic power". Coons, *supra* at 707.

B. *The Learned Professions Have Traditionally Enjoyed an ImpliedExemption from the Application of the Antitrust Laws.*

In view of the special needs and problems of certain segments of the American socio-economic structure, a substantial number of exemptions from the antitrust laws have been created or recognized during the period following the enactment of the Sherman Act. One of the most troublesome areas has been that of the learned professions. Recognizing the potential Pandora's box that it could open, the Supreme Court has steadfastly refused to bring within the purview of the Sherman Act purely professional activities. As the American Bar Association has noted:

> "When presented the occasion, the Supreme Court has at least since 1940 gingerly avoided any direct engagement with the precise question of the status of the professions under the antitrust laws on the basis that such a determination was not necessary to the particular decision before it."
> 33 ABA Antitrust L.J. 48 (1967)

Although there has never been an express statutory exemption for the professions, it was assumed, at least prior to 1943, that their tenuous connection with trade or commerce would immunize them from the provisions of the Sherman Act. In *FTC v. Raladam*, 283 U.S. 643, 653 (1931), for example, the Court, foreshadowing the later AMA cases, observed:

> "Of course, medical practitioners, by some of whom the danger of using the remedy without competent advice was exposed, are not in competition with respondent. They follow *a profession and not a trade* and are not engaged in the business of making or vending remedies but in prescribing them". (Emphasis supplied).

Similarly, in the famous case of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), the Court held that professional baseball did not constitute " trade or commerce" and thus was not a proper subject for the antitrust laws.

In 1943, the Supreme Court first gave notice that not all professional activities are necessarily exempt from the Sherman Act when it decided the American Medical Association case. Faced with the question of whether the antitrust laws were applicable to the medical profession, the Court affirmed the conviction of the AMA, the Medical Society, and various other defendants who had been indicted for a conspiracy in restraint of trade in the District of Columbia, in violation of Section 3 of the Sherman Act. It is very significant to note that the Court did not decide or even consider the question of "whether a physician's practice of his profession constitutes trade under Section 3 of the Sherman Act." *American Medical Association* v. *United States*, 317 U.S. 519, at 528 (1943). Instead, it rested its decision on the occupational status of Group Health Association, Inc., a nonprofit corporation organized by government employees. It concluded that "the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health." *Id.* at 528.

Unlike the Supreme Court in the AMA case, the Court in the instant case did not confine its inquiry to the status of the complainant, Marjorie Webster. Instead, without any precedent whatsoever for its actions, it made the awesome decision that education *is* "trade or commerce" and thus is within the regulatory scope of the Sherman Act. Whatever its technical rationale, the court below made no secret of the essential holding in its opinion:

"The myriad financial considerations involved in building programs, teachers' salaries, tuitions and miscellaneous operating expenses attest to the commercialization which necessarily exists in the field of higher education. Despite the opposition of many educators, there has been a recent trend toward the organization of faculty members to bargain collectively for better salaries and other benefits. Many institutions rent dormitory rooms and operate dining halls, book stores and other service facilities. Also there is a commercial aspect to the sharp competition for government and private contracts and the quest for research grants. In 1967-1968 institutions of higher education expended more than 17 billion dollars. The projection for the year 1976-77 is 41 billion. Higher education in America today possesses many of the attributes of business. To hold otherwise would ignore the obvious and challenge reality."
Opinion, para. 23.

As we have seen from the Supreme Court decisions discussed above, the contention that higher education constitutes "trade or commerce" is at best a moot point. The trial judge's reliance on these decisions, therefore, is unfounded, and a conclusion based only on certain business-like aspects of the educational community is inappropriate.

Even if the opinion below is viewed as based on the premise that Marjorie Webster is engaged in trade, other serious difficulties are encountered. In the first place, as Middle States correctly points out in its brief, the corporate nature of a particular entity is not determinative as to whether it can invoke the Sherman Act. The determinative test is the nature of the activity it is engaged in—whether that activity is trade or commerce or whether it is not.

(MS Brief, p. 51-52) Thus the mere fact that Marjorie Webster is a proprietary institution does not necessarily bring it within the ambit of the Sherman Act. The real inquiry must be directed to that portion of the socio-economic structure in which the institution functions. In this context, Marjorie Webster is a part of the educational profession and must live or die by its rules. And it is our contention that education, whether it be viewed as an intangible concept or as a learned profession, does not constitute "trade or commerce". This contention has never been challenged by either Congress or the Supreme Court.

Additional notice should be taken of the sheer size of the revolt which subjected the AMA to anti-trust liability. Group Health Association, Inc. involved not one, but many doctors, who held the honest belief that a prepaid, risk sharing, medical program was the most appropriate method of running the medical profession. The AMA responded with what Middle States has termed in its brief "a ruthless and concerted course of conduct to destroy Group Health Association." (MS Brief, p. 59) The entire affair was surrounded by an aura of economic warfare. This is a far cry from the instant case, where the defendant's actions have been carried on at all times on a *non*-economic level, and where there is no competitive relationship, as that term applies to the Sherman Act, between the defendant and the "victim" of its "restraint". The plaintiff here, far from being a large association such as Group Health, is a single, isolated proprietary institution, one of a tiny minority of such institutions in the United States. Are we to allow one such aberrant institution to shape the destiny of an entire profession? Reason would dictate a negative response to this question.

In the cases that have arisen since the AMA case, the Supreme Court has made it patently clear that it did not intend in the latter decision to characterize either

the medical or any other learned profession as "trade or commerce". In another case involving the health insurance business, *United States v. Oregon State Medical Association*, 343 U.S. 326 (1952), the Court once again avoided a direct confrontation with the question of whether the antitrust laws should be applied to the professions, but stated, at 336:

> "We might observe in passing, however, that there are *ethical considerations* where the historic direct relationship between patient and physician is involved which are quite different than the usual consideration prevailing in ordinary commercial matters." (Emphasis supplied).

The American Bar Association has noted:

> "This quotation illustrates both the reluctance of the Supreme Court in coming to grips with the question of the antitrust exemption of the learned professions, and at the same time the apparent feeling in the minds of at least some members of the Court, that there does exist an antitrust distinction between those who follow a 'profession' and those who follow a 'trade'."
> 33 ABA Antitrust L.J. 51 (1967).

The Court of Appeals for the Eighth Circuit followed this approach in *Riggall v. Washington County Medical Society*, 249 F. 2d, 266 8th Cir. 1957) *cert. denied*, 355 U.S. 954 (1958), when it held:

> "The practice of his profession (medicine) as disclosed by the allegations of his complaint is neither trade nor commerce within Section 1 of the Sherman Anti-trust Act."
> *Id.* at 268.

In spite of the subsequent developments discussed above, the court below apparently relied solely on the AMA case in support of its opinion that "trade" *has* been interpreted by the courts to extend to non-commercial activities such as the learned professions. This is not the case. While it is true that the term "trade" has been given a broad interpretation by the courts, the Supreme Court has never, in the AMA case or in any other case, indicated that the learned professions were necessarily a part of "trade or commerce." As noted earlier, the Court has studiously avoided this question.

In *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950), the Court, fully aware of its decision in the AMA case some six years earlier, once again left the question open. The Court commented:

> "We do not intimate an opinion on the correctness of the application of the term ('trade') to the professions."
> *Id.* at 491-492.

Instead, it chose to rely on the traditional broad definition of "trade" first proposed by Justice Story in *The Nymph* (CC.) 1 Sumn 516, 18 Fed. Cas. 506 (No. 10388, 1834) and later reaffirmed in *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427 (1932). This definition bears repeating:

> "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, *not in the liberal arts or in the learned professions*, it is constantly called a trade."
> *Id.* at 436 (Emphasis added).

The court below somehow construed the AMA decision

as precedent for the notion that the traditional definition is no longer good law. Yet there is absolutely nothing in the AMA decision to buttress that proposition.

One further point in this area warrants discussion. Several writers have noted that the economic or non-economic motivation of the professional man or organization is of significance in determining the exempt status of a professional practice. See 33 ABA Antitrust L.J. 52 and Coons, *Non-Commercial Purpose As a Sherman Act Defense*, 56 Nw. U. L. Rev. 705 (1962). Although the role of motive and intent in the anti-trust laws is not at all clear, the Supreme Court has announced that there are "some areas of our economic and political life in which the precepts of antitrust must yield to other social values". See 71 Yale L.J. 75, 88 (1961). In its recent unanimous decision in *Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court held that a combination of railroads to wage a publicity campaign against truckers through legislative lobbying, etc., was political activity and thus was not within the scope of the antitrust laws. It is suggested that the precepts of antitrust must yield as readily to educational, as to governmental, values.

Like the activity in the *Noerr* case, the functions performed by the educational accreditation agencies in the instant case are "essentially dissimilar" to "agreements traditionally condemned" by the Sherman Act. From the point of view of motive, however, the above agencies possess one great advantage which even the defendants in *Noerr* could not claim. After all,

> "The *Noerr* decision involves only the standard purpose of businessmen to make profits. The justification of the restraint lies on the side of the means adopted for its imposition. Nevertheless, this does not diminish

> the importance of the case as an index of the kind of non-competitive and untraditional considerations which may exert influence on situations that 'bear little if any resemblance' to the combinations normally held violative of the Sherman Act."
> Coons, *Non-Commercial Purpose As A Sherman Act Defense,* 56 Nw. U. L. Rev. at 751.

The field of higher education, on the other hand, is distinguished by the conspicuous absence of the profit motive and other commercial trappings, as illustrated by its unyielding commitment to a position in the market-place of ideas rather than the economic market-place comprising the traditional domain of the antitrust laws. No stronger case for exemption by implication could be made.

II. The District Court Erred In Upholding Marjorie Webster's Constitutional Claim

A. *The Editorial Written By Dr. J. Herbert Hollomon and Relied Upon By the Trial Judge Neither Supports a Conclusion That the Nonprofit Standard Is Arbitrary, Discriminatory and Unreasonable, Nor a Holding That Education Is Trade Or Commerce.*

With regard to the second count, in which Marjorie Webster seeks relief under the Constitution and the common law controlling the activities of private associations, the trial judge acknowledged that "precedent in this field is limited". (Opinion, para. 41). He concluded, however, that the nonprofit standard is "arbitrary, unreasonable and contrary to the public interest" (Opinion, para. 43) and that "fundamental fairness dictates that the plain-

as precedent for the notion that the traditional definition is no longer good law. Yet there is absolutely nothing in the AMA decision to buttress that proposition.

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tiff is also entitled to prevail on count two". (Opinion, para. 41).

The trial judge began his opinion, regarding the second count, with the observation that "a crisis exists in higher education today". The suggestion is that business can solve many of the problems currently confronting the American educational system and that proprietary institutions should therefore be eligible for accreditation. He states that "it has become increasingly apparent that the demands of the educational deficit cannot be met exclusively by foundation, state and federal financing". (Opinion, para. 40). His authority for this statement is a quotation from an editorial written by the President of the University of Oklahoma, Dr. J. Herbert Hollomon, when he was Assistant Secretary of Commerce for Science and Technology:

> "Every year I visit 25 to 50 business firms and 25 to 50 colleges and the contrast in being 'business-like' is striking. We would not let a company gain a monopoly and become so entrenched that its services declined. Why should this happen in our educational system? We need the competition of business in education which is now in the domain of city, county, and state government. Getting business more heavily into the educational field is the best way to guarantee competitiveness and innovation and insure against monopolistic control and exploitation."
> (Opinion, para. 40)[1]

In view of the trial judge's apparent reliance on Dr. Hollomon's editorial, a few comments on the essay are appropriate. Dr. Hollomon states that education "is now in the domain of city, county, and state government". That

[1] The entire editorial is Appendix A hereto.

statement certainly reflects the policy codified in the National Reform Education Act. It obscures, however, the significant role played by the private, nonprofit institutions in our educational system.

Dr. Hollomon goes on to state, in a portion of the editorial not quoted by the trial judge, that more business techniques should be applied by our educational institutions. To the extent this statement urges the streamlining of administrative procedures in educational institutions along business lines, the New England Association readily concurs. To the extent the editorial can be interpreted to endorse the profit motive for educational institutions, however, the New England Association disagrees.

In the context of count one, the trial judge noted that "there is nothing inherently evil in (an educational institution) making a profit . . ." (Opinion, para. 30), and that "the profit motive might result in a more efficient use of resources". The trial judge must realize, however, that all businesses do not operate with equal efficiency and that the business form alone does not assure operational efficiency. Furthermore, it is the judgment of the New England Association that a profit motive is fundamentally inconsistent with educational purposes.

While it is true that Dr. Hollomon mentions junior colleges in his editorial, the other types of institutions he cites do not fall into the mold of the traditional learned professions, but are more in the nature of trade or business. Vocational schools, business schools, secretarial schools, and computer schools, the examples he cites, have not pursued the traditional academic goal of empirical truth, but have been involved in teaching certain practical business skills along the lines of the training programs presently offered by large business organizations. These latter types of institutions for the most part have not been involved in the accreditation process and do not fall within

any of the guidelines establishing the academic jurisdiction of the six regional agencies. To the extent they have been involved with accreditation, they are subject to review by specialized accrediting agencies.

The trial judge further characterized the "crisis in higher education today" by stating that "students, dissatisfied with established routines and unquestioned goals, are demanding reform". (Opinion, para. 40). The headlines of many newspapers during the past year clearly reveal that the reform students seek is not more, but less, business intervention in education. A large measure of student dissatisfaction reflects concern with the priority which business necessarily places on the profit motive. It is this student philosophy that denounces policies of investing university funds in companies or geographic areas where racial discrimination is practiced, even though these investment opportunities potentially offer a high rate of economic return. It is this student philosophy which views with contempt any proposal for university affiliation with a corporation manufacturing munitions of war, even though war-related industries often realize a handsome profit. And it is this philosophy which rejects any college or university commitment which is not directly relevant to the purely educational process or which threatens the autonomy of the educational institution.

Finally, it should be noted that Dr. Hollomon outlines in the editorial his views regarding what our educational system should be. At no point in the editorial does he suggest that education is presently like business. This may not be particularly noteworthy with respect to count two, but it does stand in marked contrast to the trial judge's conclusion on the issue of education as "trade or commerce" in count one. (Opinion, para. 23). The point is that Dr. Hollomon focuses on the essence of business—the profit motive—and not merely certain techniques of

business which have gained widespread application in non-business areas.

In short, the trial judge's conclusion on count two, based on Dr. Hollomon's editorial and an assumption that educational communities would welcome direct business intervention, is therefore inappropriate.

B. *The Legal Structure and Method of Operation of Middle States Militates Against Judicial Supervision of the Association's Role.*

The trial judge held that Middle States "acts in a quasi-governmental capacity" by virtue of its role in the distribution of Federal funds under the aid to education statutes (Opinion, para. 37) and in view of the great reliance on accreditation by the public (Opinion, para. 49).

The New England Association does not deny that all of the six regional associations have achieved positions of great influence in American education. Recognition by the government of work performed by the associations, or any other private corporation for that matter, however, does not necessarily elevate them to positions of agency with the government and should not subject them to the constitutional limits applicable to government. Constitutional issues, similar to those raised in the instant case, confronted the U.S. District Court for the Northern District of Illinois, Eastern Division, in *Parsons College v. North Central Ass'n of Colleges & Secondary Schools*, 271 F. Supp. 65 (N.D. Ill., E.D. 1967). There the District Court concluded on those issues as follows:

> "With a corporate charter granted under general law, the Association stands on the same footing as any private corporation organized for profit or not. The fact that the acts of the Association in granting or deny-

> ing accreditation may have some effect under governmental programs of assistance to students or colleges does not subject it to the constitutional limits applicable to government, any more than a private employer whose decision to hire or fire may affect the employee's eligibility for unemployment compensation".
>
> 271 F. Supp. at 70.

The point is that the Associations have assumed a position of leadership in a limited sphere of activity, but there has been no delegation of authority by the government. They have tried to cooperate with the government but have clearly maintained integrity of operation.

In a case, the facts of which are analogous to those in the instant case, the New York Court of Appeals rejected a similar attempt to invoke Constitutional protections. *Salter v. New York State Psychological Association*, 14 N.Y. 2nd 100, 198 N.E. 2nd 250 (1964) involved an effort by an excluded applicant to force his way into a professional association notwithstanding his failure to meet a membership standard requiring all applicants to have completed graduate work in psychology. In *Salter*, as in the present situation, the plaintiff cited a number of relationships between the association and the State and argued that these relationships subjected the activities of the association to due process limitations. Relying on established Supreme Court cases, the New York Court of Appeals unanimously rejected the argument and held:

> "Petitioner's showing of co-operation between this professional group and the State's own Advisory Council falls well short of the Nixon case's test: 'Whether they (political party committee) are to be classified as representatives of the State to such an

> extent and in such a sense that the great restraints of the Constitution set limits to their action.' (286 U.S., supra, p. 89 . . .). Co-operation and leadership, advice and reliance on advice—these are shown, but not shown is delegation by or agency of the state." 198 N.E. 2nd at 250.

The action complained of in the instant case—the refusal of Middle States to accept Marjorie Webster's application for accreditation in 1966—was the private action of Middle States. There was no evidence at the trial indicating that either the Federal government or the District of Columbia could or did directly influence the membership policy of the Association.

Educational accrediting agencies, like other non-profit associations, thrive on autonomy. As suggested by professor Chafee almost forty years ago:

> "The value of autonomy is a final reason which may incline the courts to leave associations alone. . . . Like individuals, they will usually do most for the community if they are free to determine their own lives for the present and the future. A due regard for the corresponding interests of others is desirable, but must be somewhat enforced by public opinion. Legal supervision must often be withheld for fear that it may do more harm than good."
> Chafee, *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993, 1027 (1930).

Autonomy takes on special significance here in view of the unique competence of the accrediting agencies. "The courts, like the legislatures, can hardly profess to be better qualified to decide how teaching shall be carried on

than are the teachers and their administrative associates." *Id.* at 1028-29.

Furthermore, the method of operation of the six regional agencies militates against judicial acceptance of a supervisory role regarding their activities. The accrediting agencies do not monitor every act of member schools. Instead, they establish general standards and require that schools meet those standards to be eligible for accreditation. Setting such standards, and interpreting and enforcing them, requires a special competence, and courts, lacking such expertise, should be reluctant to interfere.[2]

Finally, it is apparent that the associations regard the non-profit standard as a matter of "substance" and not merely as a question of "procedure". The associations have concluded that the non-profit criteria is a necessary condition to educational quality. While the court may properly take an active role in reviewing the procedure of the association, it should take a restrictive role regarding matters of substance where the associations, by their composition and the nature of their endeavor, have a particular expertise.

III. The Plaintiff Has Failed To Sustain Its Burden of Proving That the Restraint of Trade Is Unreasonable and Hence Illegal.

The trial judge correctly noted that this case does not involve practices illegal *per se* under the Sherman Act. As the opinion explicitly states:

> In the absence of a *per se* violation, proof is essential that the agreement resulted in an unreasonable re-

[2] Accreditation is an old, established function of the various regional associations. The New England Association was the first to be established—in 1885. Its policy of excluding proprietary institutions from accreditation is one of long standing. See testimony of Dr. Dana M. Cotton, Executive Secretary, New England Association, at Tr. 5909-5929.

> straint of trade.
> Opinion, para. 27.

Judge Smith also correctly stated the position of Middle States on this issue:

> If the Sherman Act is applicable, Middle States contends that its actions have been entirely reasonable and completely within the public interest.
> *Id.*, para. 11.

Reasonableness, then, becomes the critical factor respecting the issue of whether the conduct sought to be proscribed is or is not illegal. But the key point, in view of the current posture of this case on appeal, is that *the plaintiff bears the burden of proving the required unreasonableness.* The New England Association respectfully submits that the plaintiff has failed to sustain this burden.

The term "unreasonableness" is by its very nature elusive. Nonetheless, the plaintiff still had to prove its existence, and this proof necessitates introducing into evidence empirical data. If the plaintiff properly were to discharge his duty in this respect, he would marshal facts and figures, the overwhelming content and import of which would have been to convince the court that unreasonableness as a fact was shown conclusively. This, we submit, the plaintiff has simply failed to do.

The admittedly difficult task of determining those factors which must be shown in order to establish "unreasonableness" was early undertaken by Mr. Justice Brandeis in the famous case of *Chicago Board of Trade* v. United States, 246 U.S. 231 (1918), as follows:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may

> suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.
> *Id.* at 238.

We submit that a review of the plaintiff's evidence in this case shows it to be conspicuously lacking, in most respects, in actual evidence directly related to the several factors used first by Mr. Justice Brandeis in *Chicago Board of Trade* and subsequently by other courts in similar situations. Such a review of the evidence shows it to be replete with *conclusions,* but even most of them are directed toward the very narrow—and hardly conclusive—point that the lack of accreditation of the plaintiff somehow hurts, or might hurt, its students who, upon completion of the standard two-year Marjorie Webster curriculum, seek transfer with full advance standing to four-year post-secondary schools. See, for example, the testimony of Doctor Elliott and Mrs. Block. (Tr. 529; 6854, 6680-6681, respectively). But even on this point, upon which the plaintiff seems to rely so heavily, its own evidence was equivocal. On cross-examination, Dr. Elliott himself admitted in effect that there was no real, iron-clad exclusionary rule after all. Each applicant for advance-standing transfer, he allowed, is a separate case unto himself and the actual decision on his application involves review of several factors. (Tr. 534) Similarly, said Mr. Lester Dye, Director of Admissions at Syracuse University, whose deposition was made part of the plaintiff's case in chief,

no absolutely rigid criteria apply when a student seeks this kind of transfer. Each application, he acknowledged, is considered on its own merit and accordingly, even a transfer applicant from a non-accredited junior college could—if his record so qualified him—be admitted to advance standing. (Tr. 2881).

Another example of where the plaintiff's case fell far short of satisfactory proof of one of Mr. Justice Brandeis' "factors of unreasonableness" was the testimony of Dr. James S. Coleman, sociologist at Johns Hopkins University. We submit that Dr Coleman's entire testimony was, on balance, unhelpful to the plaintiff, and *a fortiori* to his position on this appeal. The question whether the exclusion of proprietary institutions does in fact serve the Association's stated purpose (a question which we admit *is* directed towards one of the *Chicago Board of Trade* "factors of unreasonableness") was answered by Dr. Coleman in a less-than-convincing fashion. While he gave his conclusion that the exclusionary standard did not serve the stated purpose, nowhere in nearly 150 pages of testimony did he offer—or even suggest—a reason or rationale. (See Tr. 369-512). His opinion should be even more suspect on this appeal by virtue of the fact that Dr. Coleman, undoubtedly a leading sociologist, has never participated in accreditation nor even studied the process, (Tr. 407), nor was he at all familiar with the finances of colleges—proprietary or otherwise. (Tr. 491-492). Dr. Coleman's real quarrel, as it so developed, was not with any exclusion of proprietary schools but rather with current infringements on academic freedom. (Tr. 441-442). This, we submit, approaches irrelevance for our purposes.

An exhaustive review of the entire plaintiff's case is beyond the scope of this Brief. Such a review by this court, however, must be undertaken and when completed, we are confident that the glaring shortcomings of the plaintiff's

case on this point will be revealed. We cannot over-emphasize the strength of our conviction that, applying each of the carefully-designated criteria from *Chicago Board of Trade*, the trial judge's finding of an unreasonable restraint is clearly erroneous.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

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APPENDIX "A"

EDITORIAL

J. Herbert Hollomon

Acting Under Secretary of Commerce

COMPETITION IN BUSINESS AND EDUCATION

Dr. Hollomon has been Assistant Secretary of Commerce for Science and Technology since May, 1962. He was named Acting Under Secretary by President Johnson on February 1, 1967. Dr. Hollomon was General Manager of the General Electric Company's General Engineering Laboratory before entering Government service This editorial has been secured through Richard A. Fulton, Executive Director and General Counsel, United Business Schools Association.

Every year I visit 25 to 50 business firms and 25 to 50 colleges and the contrast in being "business-like" is striking. We would not let a company gain a monopoly and become so entrenched that its services declined. Why should this happen in our educational system? We need the competition of business in education which is now in the domain of city, county, and state government. Getting business more heavily into the educational field is the best way to guarantee competitiveness and innovation and insure against monopolistic control and exploitation. It would also serve to limit growth of all-inclusive government. The idea could be initiated in junior colleges, in vocational schools, in business schools, in secretarial schools and in computer schools. We might have, for example, a chain of 25 junior colleges operated for profit. This practice would enable many good ideas to get off the ground.

The schools could take advantage of scale by hiring specialists to prescribe the various courses. Our educational system could also farm out some of its work to private business the way NASA and other Government agencies do now. Very often this is a more effective way of handling public services than by doing them in-house.

The several levels of government would not relinquish

control of education, but there is no reason why private enterprise can't do some of the work by contract from the government. If performance is unsatisfactory, the contract can be let to someone else. I am not suggesting that all colleges should become businesses, but that all colleges should be run in a business-like manner. The final mix in each state or each community would include both proprietary and not-for-profit institutions. The competition would be good for both kinds. Private industry has developed answers to many national problems.

An example is the electric power field. It made its own market in the beginning. The electric power industry wasn't in existence until it provided financial support to enable communities to buy generation equipment. There are rapid changes taking place in our society. We are spending an increasing amount of our money on schools, medicine, transport and recreation—basically public goods, as contrasted with food, fiber, and shelter—basically private goods. The greatest future for American industry is to organize itself in an imaginative way to deal with these social problems through participation in the public market.

An increasing number of goods and services are going to be bought by groups of people rather than by individuals. However, I cannot buy a school system for my sons. All I can do is to buy a public school education for them, through taxes, or a private school education, through tuition. However, a group can get together and develop an educational system. We see this procedure most frequently in cooperative nursery schools or kindergartens, which mothers form when the public schools do not provide them. There's no reason why other groups—say, profit-making companies—should not do just what those mothers do, that is, fill a vacuum, meet a need for high-quality educational facilities and services. At the nursery or kindergarten level, it's relatively inexpensive, and mothers vol-

unteering their services can often meet the need. In high school, technical, or college education, more professionalism is required—often more than the traditionalists are prepared to supply. That's when the group I referred to should get together. They might find that they can supply a social good or a social service or a public good or a public service through the play of the public market.

These are thoughts which I have developed for many other fields—the nation has applied them to aeronautics, to space, to communications, and Lawence F. O'Brien, the Postmaster General, recently suggested that the Post Office be reorganized as a quasi-public institution to achieve more business-like practices. Industry needs to organize to reach the public market to sell all kinds of goods and services. It is obvious that the public needs and is willing to pay for those goods and services. I further believe that it is appropriate that industry find ways of providing them. Yes, it will require imagination and invention and innovation and risk and venture and capital, and there will be an impressive series of failures. The needs of the public market will not be met by having the same general attitude prevalent today among space and aerospace companies: in other words, through getting contracts with the Federal Government. "Let Uncle Sam pay for it" is not entrepreneurship. . . . The creative business enterprise will locally create the market and sell its products and services at the local level. The creative business enterprise is the one that will survive the intense competition I anticipate.

It is difficult to get people in the frame of mind to accept anything this different although I'm not proposing revolutionary moves but gradual changes. This is similar to creating a market for a product people haven't bought before . . . reminiscent of the way Gillette created a market for razor blades by putting razors in the hands of

people. The need to shave was already there. The innovation was the tool which required the patented razor blades which Gillette wanted to sell.

Let's suppose that a town is going to start a junior college. Instead of the town running the junior college and hiring teachers and so on, why not go to an appropriate industrial firm and say, "You design the junior college, you hire the teachers, you learn how to do it, you work with the educators, you operate the junior college at a profit. Instead of our putting money directly into the junior college, we will give the monies to the students, who then can go there or elsewhere, depending on who can sell them on having the best education." There is no reason why running a liberal arts or business administration college should not be considered an appropriate function for private enterprise, just as secretarial and business technique schools have traditionally been proprietary. Now, the idea will be new and, to many, shocking. I personally know of only three or four proprietary liberal-arts colleges started in this country in recent years and one has just lost its accreditation . . . but I fundamentally don't see why we can't go as far as to operate part of the educational system at a profit. That's one of the new patterns of industry-government partnership I foresee in the coming decade.

There will be many problems to solve. I don't know how many Federal agencies are somehow involved in a city's educational system—maybe 10, 15, 20 or 30, depending upon the kind of subject. Towns don't know how to deal with the Federal Government. They couldn't possibly have the expertise. One of the things that industry could do in cooperation with towns all over the country is to help them to better deal with the Federal Government and to do it in a profitable way. Why should not American enterprise

deal with these problems and provide these goods and services at a profit?

We have traditionally accepted as a desirable incentive the idea of profit for goods and services appropriately rendered at the market. Why shouldn't the same incentive be used to provide public goods and services?

EDITOR'S NOTE: *"Under Contract Training" is authorized by such Federal laws as:*

1. Vocational Rehabilitation Act of June 2, 1920, as amended 29 U.S.C. 31 et seq.

2. Manpower Development and Training Act of 1962; as amended, 42 U.S.C. 2571; P. L. 89-792.

3. Indian Adult Vocational Education: 15 U.S.C. 309, 452, 823(c).

4. Economic Opportunity Act of 1964, as amended, 42 U.S.C. 2701 et seq; P. L. 89-794.

5. Government Employee's Training Program: (P. L. 89-554) 5 U.S.C. 4101-4118.

6. Economic Development Administration (P. L. 89-15) 42 U.S.C. 2583.

7. Vocational Education Act of 1963; P. L. 88-210; Sec. 8 (1).

Generally it is implemented on an individual or ad hoc basis. With Federal and state cooperation Dr. Hollomon's proposal for operating an entire junior college "under contract" might be conducted pursuant to the Vocational Education Act of 1963 (P. L. 88-210).

For further amplification of these ideas, see Technological Innovation: Its Environment and Management, a new Department of Commerce report from the Superintendent of Documents, U. S. Government Printing Office, Washington, D. C., 20402. (Price $1.25) or Science and Technology for Mankind's Progress, a popular pamphlet, also from U.S. Government Printing Office, 25c.

BRIEF FOR THE SOUTHERN ASSOCIATION OF COLLEGES AND SCHOOLS, INC., AS AMICUS CURIAE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23351

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC., *Defendants-Appellants*

v.

MARJORIE WEBSTER JUNIOR COLLEGES, INC., *Plaintiff-Appellee*

On Appeal From the Judgment of the United States District Court for the District of Columbia

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On Appeal From the Judgment of the United States District Court for the District of Columbia

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BRIEF FOR THE SOUTHERN ASSOCIATION OF COLLEGES AND SCHOOLS, INC., AS AMICUS CURIAE

AUTHORITY FOR FILING BRIEF

This Brief is submitted pursuant to Rule 29 of the Federal Rules of Appellate Procedure on behalf of the Southern Association of Colleges and Schools, Inc., upon Motion For Leave To File Brief As Amicus Curiae, as presented to this Court on October 24, 1969.

STATEMENT OF ISSUES PRESENTED

1. Whether the educational activities allegedly restrained were activities which constitute "trade or commerce" within the meaning of Section 3 of the Sherman Act, 15 U.S.C. § 3.

2. Whether the policy of Middle States by which profit-oriented, proprietary institutions are excluded from membership in the Association is properly cognizable under Section 3 of the Sherman Act, 15 U.S.C. § 3, as a restraint of trade without consideration of "substantive justification" for the policy arising from the unique nature of Middle States and its role in the public interest or whether antitrust policy must yield to other overridiing public policy.

3. Whether the exclusion of proprietary institutions from membership in the Association may properly be found an "unreasonable" restraint of trade without consideration of the unique nature and needs of the Association, the public interest served by the Association, the damage which would result to the functions of the Association, the lack of any direct effect upon the operations of the proprietary institution and in the absence of any ascertainable damage to the proprietary school resulting from the exclusion.

REFERENCE TO RULINGS

The basis of the order and judgment presented for review in this Court is set forth in the Opinion, Findings of Fact and Conclusions of Law of the Honorable John Lewis Smith, Jr., Judge of the United States District Court for the District of Columbia in the case styled:

Marjorie Webster Junior College, Inc. v. *Middle States Association of Colleges and Secondary Schools, Inc.*, Civil Action No. 1515-66; Issued July 23, 1969. The Opinion is reported at 1969 Trade Cases ¶ 72,864 (D.D.C.).

STATEMENT OF THE CASE

Plaintiff-Appellee Marjorie Webster Junior College, Inc. (Webster) is a for-profit, business corporation of the District of Columbia, owned and controlled by the members of one family, who hold most of the administrative and corporate offices in the corporation and institution and who are its sole stockholders. Established in 1920 as a school of physical education and expression, Webster was incorporated in 1947 as a junior college for women. It has successfully operated as such to the present without evaluation and accreditation by Defendant-Appellant Middle States Association of Colleges and Secondary Schools, Inc. (Middle States).

Middle States was incorporated as a nonprofit educational organization under the New York Education Law in 1966. Its predecessor, an unincorporated association, has been in existence since 1886.

In June 1966 Webster sought equitable relief—and no damages—against Middle States under Section 3 of the Sherman Act (Count 1) because Middle States refused to consider Webster as eligible for evaluation and accreditation since the latter was not a nonprofit or public institution with a Board of Trustees representing the public interest. Webster subsequently amended its Complaint to add a count claiming that Middle States' eligibility criteria was unjust, arbitrary, and unreasonable and that Webster was entitled to equitable relief therefrom because of Middle States' status as a quasi-governmental organization (Count 2).

After extensive discovery, motions for summary judgment filed by both Webster and Middle States in October, 1968, were denied on December 6, 1968. Trial commenced February 24, 1969, and ended May 5, 1969, with over 7,000 pages of transcript and several hundred exhibits. The entire record has been certified to this Court.

The Trial Court's decision was issued July 23, 1969. Relief was granted to Webster under both counts of the Amended Complaint.

The basic finding of the Court, which affects its entire decision under both counts, is that higher education, including accreditation of institutions of higher education, is trade or commerce under Section 3 of the Sherman Act. The Court reached this conclusion by finding, among other things:

1. "The test of jurisdiction and venue is *whether a corporation has made its presence felt in a particular area to advance its essential business purposes.* Although it maintains no Washington office, the extent of its activities here clearly indicates that Middle States can be 'found' and is 'doing business' in the District of Columbia as contemplated by the statutes." (Para. 18) (Emphasis added.)

2. "*A new and pivotal question here for determination is the applicability of the antitrust laws to the field of education. Is higher education, including the accreditation of institutions, trade or commerce and thus within the regulatory scope of the Sherman Act?*" (Para. 20) (Emphasis added.)

3. "*The myriad financial considerations involved in building programs, teachers' salaries, tuitions, and miscellaneous operating expenses attest to the commercialization which necessarily exists in the field of higher education.* Despite the opposition of many educators, there has been a recent trend toward the organization of faculty members to bargain collectively for better salaries and other benefits. Many institutions rent dormitory rooms and operate dining halls, book stores and other service facilities. Also there is a commercial aspect to the sharp competition for government and private contracts and the quest for research grants. In 1967-68 institutions of higher education expended more than 17 billion dollars. The projection for the year 1976-77 is 41 billion. *Higher education in America today possesses many of the attributes of business. To hold otherwise would ig-*

nore the obvious and challenge reality." (Para. 23) (Emphasis added.)

4. "* * * Webster is a corporation engaged in business for profit. *Its corporate activity consists of offering educational facilities and services in exchange for the tuition charged students.*" (Para. 24) (Emphasis added.)

5. ". . . (M)embership in Middle States results in a special advantage to members of the association over non-members and deprives the non-members of *a significant business service. Accreditation is necessary to engage in effective competition in the field of higher education today.* * * *" (Para. 33) (Emphasis added.)

6. "* * * The American system of free enterprise is structured on fair and open competition—not monopoly.* * *" (Para. 41)

7. "* * * Lack of regional accreditation harms and inhibits Plaintiff in its attempt to compete with institutions which are members of the defendant association and the other regional associations.* * *" (Para. 43) (Emphasis added.)

The Trial Court held that no evil intent existed on the part of Middle States, Middle States was formed with laudable purposes, and Middle States has "elevated the quality of education." Despite these findings, the formation of Middle States itself constituted a combination, contract, and conspiracy in restraint of trade. Because Middle States' members had a "special advantage" which deprived Webster of a "business service" (like a broker denied stock exchange services), a restraint under the Sherman Act was established. (Opin. Paragraphs 25, 26 and 39).

Middle States' eligibility criteria was judged unreasonable because it did not further its own aim of improving higher education, which needed the benefit of commercial competition and the profit motive. ". . . (D)efendant's requirement that institutions of higher education be non-

profit organizations with a governing board representing the public interest . . . is arbitrary, unreasonable, and contrary to the public interest." (Opin. Paragraphs 29-32, 43).

With regard to the second count, the Trial Court held that, while precedent in the field was limited, "fundamental fairness dictates that plaintiff is entitled to prevail on count two". (Opin. Para. 41). In reaching its conclusion with regard to Count 2, the Trial Court quoted the President of the University of Oklahoma, who did not testify at the trial, as saying that:

> "We need the competition of business in education . . . . Getting business more heavily into the education field is the best way to guarantee competitiveness and innovation and insure against monopolistic control and exploitation."

On the basis the Court below concluded that the nonprofit standard is "arbitrary, discriminatory and unreasonable." (Opin. Paragraphs 39-40).

On July 30, 1969 Middle States filed a petition for stay pending appeal. A stay was denied by the District Court. On appeal, this Court stayed the order of the District Court to December 22, 1969.

Southern Association of Colleges and Schools, Inc., as Amicus Curiae, adopts as its Statement of Facts the Statement set forth in the Brief of Appellant Middle States Association.

SUMMARY OF ARGUMENTS

1. The District Court failed to consider whether a "substantive justification" should be interposed in defense of Middle States' refusal to accept proprietary institutions into its membership. The recent United States Supreme Court case of *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), recognizes a defense to an antitrust action based upon "any justification derived from the policy of

another statute or otherwise" which is not similar to a defense under the "Rule of Reason" test used by the District Court. Appellant Middle States, representing many state, federal, religious and private non-proprietary educational institutions, was entitled to recognition and interposition of the defense of "substantive justification" and, consequently, the decision of the District Court is incorrect.

2. The recent United States Supreme Court decision of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), holds that the Sherman Act should not be applied when the defendant "bear[s] very little if any resemblance to the combinations normally held violative of the Sherman Act." Such organizations are beyond the "proscriptions of the [Sherman] Act, *tailored as they are for the business world.*" Thus the noncommercial nature of Middle States, combined with the public policy of fostering non-proprietary higher education and the peculiar nature of defendant's member-institutions, requires that the *Noerr* doctrine be considered in this case and that, applying the rule of *Noerr*, the District Court decision be reversed.

3. The activities that were allegedly restrained by Middle States are not "trade or commerce" within the meaning of Section 3 of the Sherman Act, 15 U.S.C. § 3. Moreover, the District Court considered an entire "myriad" of activities in determining whether "trade or commerce" was present even though Webster in essence complained only that its students were unable to freely transfer to non-proprietary institutions. Instead of properly considering whether a restraint on the transfer of college students was a restraint on "trade or commerce" within the meaning of the Sherman Act, the District Court wrongly considered whether faculty salaries, unionization of faculties, dining, housing and book store operations, building programs and the gross amount spent by all non-proprietary institutions constituted "trade or commerce" even though

Webster neither alleged nor proved that its faculty salaries, building programs, unionization of faculty members, dining, housing and book store operations, and competition for research grants were in any way involved or restrained.

Furthermore, in determining that Webster was engaged in "trade or commerce," the District Court attributed to Webster all of the activities of *non*-proprietary institutions, thus clearly violating the very rule of law which it purported to be following, *i. e.*, that in determining whether "trade or commerce" is involved the Court must determine whether the plaintiff's activities which are restrained are "trade or commerce", not whether the defendant is engaged in "trade or commerce." *American Medical Association v. United States*, 317 U.S. 519 (1943).

4. The District Court utilized a mechanical application of the Rule of Reason under which it improperly focused upon only one objective of Middle States, failed to analyze accurately the function of the objective so emphasized, disregarded the peculiar characteristics of Middle States arising from the nature of the organization and its unique role in the context of its operations, disregarded the particular relevance of intent and purpose to the reasonableness of the challenged rule on the facts of this case, and failed to weigh and fully analyze the character of the purported restraint, the absence of any clear relationship between the exclusionary rule and its alleged effect, and the illusory effect of the restraint alleged. Since the District Court did not perform the perceptive analysis necessary to proper application of the Rule of Reason, the decision of that Court is incorrect and should be reversed.

ARGUMENT

I. The District Court decision must be reversed because the District Court failed to consider whether there was "substantive justification" for Middle States' exclusionary policy or whether the antitrust policy involved must yield to another overriding public policy.

A. The District Court did not consider whether there was "substantive justification" for Middle States' policy of excluding proprietary institutions.

In the recent case of *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), the United States Supreme Court was confronted with the "fundamental issue [of] whether the Securities Exchange Act . . . constitute[d] an implied repealer of our antitrust laws, thereby exempting the Exchange from liability in this and similar cases." *Id.* at 347. The Court found that the New York Stock Exchange's conduct constituted an illegal group boycott under traditional antitrust law and that there was no express exemption from the antitrust laws for the Exchange. "Hence, *absent any justification derived from the policy of another statute or otherwise*, the Exchange acted in violation of the Sherman Act." *Id.* at 348-49 (emphasis added) "The difficult problem here arises from the need to reconcile . . . the antitrust aim of eliminating restraints on competition with the effective operation of a public policy . . . ." *Id.* at 349. The Supreme Court held that "[s]ince it is perfectly clear that the Exchange can offer no *justification* under the Securities Exchange Act for its collective action . . .," *id.* at 365 (emphasis added), the Exchange violated the Sherman Act. The Court declined to define the nature of this defense of justification: "Thus there is also no need for us to define further whether the *interposing of a substantive justification* in an antitrust suit brought to challenge a particular enforcement of the rules on its merits is to be governed by a standard of arbitrariness, good faith, reasonableness, or some other measure." *Id.* at 365-66 (emphasis added).

The District Court in this case determined only that higher education was "trade", that Webster's trade was restrained because many of its students could not obtain credit at other institutions for their course work at Webster, and that this restraint was due to defendant's arbitrary exclusion of proprietary schools from its Association. The District Court failed to decide the overriding question which *Silver* requires, *i.e.*, whether there was statutory or public policy which acts as a "substantive justification" for the particular form of restraint of trade that was found.

The *Silver* case clearly commands that only "absent any justification derived from the policy of another statute or otherwise," can a particular form of conduct be subject to the antitrust laws. In the normal commercial context, of course, no conceivable "substantive justification" can be established. But the facts presented to the District Court demonstrate that if an unreasonable restraint of trade exists, it is not a traditional commercial form of anticompetitive activity and there is countervailing public policy involved.

The District Court applied the "Rule of Reason" to Defendant's activities. However, *Silver* indicates that the Rule of Reason is not identical to the test of "substantive justification". The Court in *Silver* stated that "there is also no need for us to define further whether the interposing of a substantive justification . . . is to be governed by a standard of arbitrariness, good faith, reasonableness, or some other measure," *id.* at 365-66, thus clearly implying that this defense is not identical to the well-defined Rule of Reason. Since the *Silver* case was decided, no court has defined the defense of "substantive justification."

Defendant-Appellant is entitled to interpose the defense of "substantive justification" due to the statutory distinctions that exist between members of Appellant and proprietary institutions such as the Plaintiff-Appellee, the

public policy involved and the nature of the members comprising the Middle States Association.

B. The lower court did not consider whether, due to the non-commercial nature of Middle States, the absence of traditional anticompetitive activity, and public policy, the policy of enforcement of antitrust law should yield to other policies. The Supreme Court has indicated that considerations other than the antitrust laws must be taken into account in non-commercial cases involving public interest and policy. As Mr. Justice Black wrote for the majority of the Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-37, (1961):

> "Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of 'combination[s] * * * in restraint of trade,' they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market division agreements, and other similar arrangements. This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. And we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws."

Noerr recognizes that some activities are simply not of a nature that antitrust policy outweighs other public

policy. In particular the Court in *Noerr* noted the incongruity and unsoundness of applying antitrust laws to an association when it "bear[s] very little if any resemblance to the combinations normally held violative of the Sherman Act . . . ." *Id.* at 136. When the defendants' activity is not traditional anticompetitive activity, *Noerr* requires that the Court heed a "warning" against applying traditional antitrust law to these activities. Middle States is precisely such an organization that "bear[s] very little if any resemblance to the combinations normally held violative of the Sherman Act," *id.*, and which is beyond the "proscriptions of the [Sherman] Act, tailored as they are for the business world . . . ." *Id.* at 141.

The District Court never considered whether the noncommercial nature of Defendant required a different application of the antitrust laws. Despite a clear showing that Defendant-Appellant "bear[s] very little if any resemblance to the combinations held violative of the Sherman Act," the District Court applied without exception traditional antitrust cases concerning parties which were all commercial or profit-oriented entities. No "warning" was heeded and the "difficulties that would be presented by a holding that the Sherman Act forbids associations" of public, religious and non-proprietary schools were not considered.

C. The following facts and considerations should have been taken into account by the District Court under the *Silver* and *Noerr* cases.

1. Of the 346 nonprofit institutions of higher education having membership in Middle States, 106 are state or municipal universities. Generally these institutions are subject to the respective state legislatures. It is questionable whether federal antitrust law can constitutionally compel state institutions to associate with private institutions which are excluded from membership. State and municipal institutions are related to governmental bodies, and

are imbued with a public interest commensurate with that found in typical industries such as interstate carriers, labor unions, and other organizations for which an implied "exemption" from coverage under the antitrust laws has been found. See *United States* v. *Hutcheson*, 312 U.S. 219 (1941) (labor exemption); *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944) (interstate carriers exemption).

2. Four of Appellant's members were created and are controlled by the United States Government. If the members of Middle States can be enjoined from refusing membership to otherwise qualified proprietary institutions, we see no reason why the same institutions can't bring successful treble-damage actions against the members of the Associations including the United States Government.

3. Two hundred-twenty of Middle States' 346 members are private non-profit institutions. These members depend largely upon private donations and upon the absence of state or federal tax liability to remain in a liquid finaneail condition. They are generally exempt from federal taxation by being organizations "organized and operated exclusively for . . . educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual," under the *Internal Revenue Code of 1954*, § 501(c)(3). Not only must they maintain this status to avoid income taxation, but they are able to attract private donations mainly because the donor obtains a deduction for a charitable contribution under the *Internal Revenue Code of 1954, § 170*. Congress therefore has made a basic distinction between these 220 members and proprietary schools like Webster, and Congress has made an important decision to encourage non-proprietary education by granting tax exemptions. The same encouragement is not offered to proprietary schools such as Webster.

4. It was recognized many years ago that the public welfare demanded that governments make earnest attempts to provide free or low-cost education to all citizens so that

those without sufficient funds to finance their own education would not be excluded from job opportunities demanding intellectual training. The strength of this country is in part based upon the extensive education and research that public and private non-profit institutions provide. It is hardly necessary to argue that the welfare of public and private non-profit higher education is a matter of great public interest. Yet the District Court never considered the impact of its ruling upon non-proprietary educational institutions. Its attention was directed only at the detrimental effect of Middle States' policy on Webster, not the detrimental effect of admission of proprietary schools on Middle States and its public and private member-institutions. The District Court did not consider whether public policy is furthered by allowing entrepreneurs to trade for profit on their relationship with the public and private non-profit schools that have spent years building reputation for contributing to the public welfare of this nation.

5. Membership in Middle States does not guarantee that students can transfer from member-institution to member-institution without losing credits. To the contrary, many member-institutions refuse to accept students from other member-institutions and will continue to accept students on an individual basis. Some Webster students have been accepted at member-institutions and allowed to transfer with full credit. Different schools have different standards. For example, the United States Military Academies usually require a congressional appointment for entrance. Private non-proprietary schools such as Harvard University and Princeton University do not automatically accept every transfer from a member-institution and do not reject every transfer from a non-member school. There is no finding by the District Court that if Webster becomes a member of Middle States its students will be admitted to other member-institutions in greater numbers than they are now admitted. Thus it is questionable whether the relief granted by the lower court will have any bearing

on the alleged complaint of Webster. However, Webster can advertise its accreditation and thereby attract students who believe from advertisements that a Webster education will unlock the doors to Radcliffe, Wellesley, Sarah Lawrence, Vassar and other member-institutions. This enables Webster to increase revenues and concurrently shareholder profits, which it complains have been injured because of its inability to attract more students.

6. No finding was made as to whether Webster and other proprietary schools have anything to contribute to the Association's purposes. Middle States and other regional associations pool their experience and knowledge of the field of non-proprietary education. The Associations are not formed to inhibit competition, but to benefit one another in improving the overall system of public and private non-proprietary education. Member-institutions must and do contribute funds and, more importantly, experience, to other schools confronting similar problems. But the District Court never considered whether Webster can contribute anything of value to institutions that have problems distinct from those of Webster. Webster's primary complaint is its inability to attract students who can contribute profitable tuition to the institution. This is obviously not a problem in common with the members of Middle States.

7. The District Court also failed to consider the administrative and financial burden on Middle States, and consequently its member-institutions, that will result from having to review for membership the many proprietary schools that it can be foreseen will apply for membership to the Regional Associations. Because most non-profit institutions are not profit-motivated, they have no direct interest in making unwarranted cuts in cost to the detriment of educational quality. But when profit-motivated institutions obtain membership, incentives to cut overhead to increase profit margins to the detriment of educational quality will be great, therefore necessitating costlier and more

intensive continual surveillance by the Association. But the District Court failed to consider these ramifications of its holding. Its concern was solely with the welfare of proprietary institutional profits, in a manner unwarranted by the *Silver* and *Noerr* cases, which require an inquiry into the resultant effect of enforcement of antitrust policy upon other areas of public policy.

II. The District Court erred in deciding that the restraint found was a restraint of activities constituting "trade or commerce."

The Sherman Act is applicable only if there is a restraint of "*trade or commerce.*" Some activities do not constitute "trade or commerce." *Federal Baseball Club v. National League,* 259 U.S. 200 (1922) (baseball not "trade or commerce") *reaffirmed, Toolson* v. *New York Yankees, Inc.,* 346 U.S. 356 (1953). The District Court relied upon *American Medical Association* v. *United States,* 317 U.S. 519 (1943), in holding that the activities engaged in by Webster constituted "trade or commerce." However, the *AMA* case on its facts is clearly inapplicable and it was error to apply *AMA* in a fact situation so foreign to the facts shown in *AMA*. Furthermore, the District Court failed to properly define the activity engaged in by including such activities as the unionization of faculty members and competition for research grants as activities called into question by Webster even though these activities were never brought into the issue by the parties. The only activity that Webster complained of was the restraint on the transferability of its students to other institutions and the transfer of students is not "trade or commerce." *Marston* v. *Ann Arbor Property Managers Ass'n,* F. Supp. , 1969 TRADE CASES ¶ 72,862 (E.D. Mich. 1969). Finally the District Court violated the principle of the very case it was purportedly following (*AMA*) by attributing all the activities of non-proprietary institutions to a proprietary school to determine whether the latter was engaged in "trade or commerce."

The lower court stated that "[t]he Supreme Court held in the third *AMA* case that when the organization at which the restraint is directed is in trade, it is immaterial whether the offending association is so engaged. *American Medical Association* v. *United States*, 317 U.S. 519, 528, 529 (1943)." However, the *AMA* case referred to and strongly relied upon by the lower court involved an organization of doctors who stood to lose substantial fees from patients if Group Health Association, Inc., continued to operate.

Thus, self-preservation, self-interest and profit-motivation were the forces behind the defendant's conduct in the *AMA* case. Since the *AMA* case, the Supreme Court has stated that the "proscriptions of the [Sherman] Act, *tailored as they are for the business world*, are not at all appropriate for application in [other contexts]." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961) (political activity) (emphasis added).

In *Noerr* the Court determined that it was not the *purpose* of the antitrust laws to regulate political activity; despite even the existence of an anticompetitive purpose in that activity, "legality [of that activity] was not at all affected by any anticompetitive purpose it may have had." *Id.* at 140. See also *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965) ("The Sherman Act . . . was not intended to bar concerted action of this kind even though the resulting official action damaged other competitors at whom the campaign is aimed.") Commissioner Elman, dissenting in *Community Blood Bank of the Kansas City Area, Inc.*, CCH Trade Reg. Rep. ¶ 17,728, (FTC Dkt. 8519, 1966), expressed a related view when he said that "[m]uch can be said for confining the reach of the antitrust laws to boycotts that are economic in origin, as in the group health case." *Id.* at 23,041.

The *AMA* case is clearly distinguishable from the facts presented to the District Court in *Webster*. The Govern-

ment's contention in *AMA* was that the *AMA* opposed Group Health because

> "they feared competition between the plan and the organized physicians and that, to obstruct and destroy such competition, the petitioners conspired with certain officers and members and hospitals to prevent successful operation of Group Health's plan by imposing restraints upon physicians affiliated with Group Health, by denying such physicians professional contact and consultation with other physicians and by coercing the hospitals to deny facilities for the treatment of their patients."

American Medical Ass'n v. *United States*, 317 U.S. 519, 532-33 (1943). The Supreme Court sustained the sufficiency of this indictment. It is difficult to imagine how the *AMA* case, which involved predatory and intentional acts to restrain trade so as to directly benefit the economically-motivated defendants, can be used as precedent for the activities of Middle States, whose member-institutions are not profit-motivated, and either cannot make a profit without risking the loss of their tax-exempt status, or were directly created and are supervised by the United States Congress and the legislatures of the respective states. There was no evidence that Middle States' members practiced any predatory acts or had any feeling towards Appellee that was stronger than complete disinterest. As the District Court found:

> "Plaintiff does not contend that the members of Middle States conspired specifically to restrain its trade nor that the six regional associations formed the federation for that purpose. The evidence negates the existence of any evil, purposeful plotting by the defendant and Webster concedes that the reason for combining was honorable and laudable." (Opinion, Paragraph 24)

The District Court's own findings are diametrically opposed to the allegations and findings in *AMA*, where an intentional, evil and self-interested course of conduct was

alleged. Therefore, the analysis and holding of the *AMA* case should not be applied in a factual context that is foreign to the practices and self-interested nature of the defendant that existed in *AMA*.

The inapplicability of the *AMA* case rests not only on its factual distinctiveness but also on the more recent pronouncements of the Supreme Court in *Noerr* and *Silver* that antitrust laws should not be applied in areas where a traditional form of anticompetitive activity is not involved or where strong public policy considerations may override the policy of enforcement of antitrust laws. The heart of the doctrines found in *Silver* and *Noerr* is that Congress intended to control only traditional forms of anticompetitive conduct in enacting the Sherman Act and did not intend to outlaw activity which public policy should encourage or antitrust law should view with neutrality.

If the lower court decision is affirmed on the basis that higher education is "trade or commerce" and it is not entitled to special consideration in light of the public policy involved and the non-commercial and non-competitive nature of defendant, the ramifications of such a holding expose the unsoundness of it. For example, a profitable religious organization would have a cause of action for injunctive relief and treble damages against an ecumenical or denominational organization of non-profit churches which refused it admittance on grounds that it was proprietary. Unreasonable boycotts by minority groups of products or merchants would clearly be a prohibited restraint of "trade or commerce". The participants in a simple consumer boycott of the kind now being used in many communities would be just as susceptible to an injunction and treble damages as state, church and private nonproprietary schools will be susceptible to injunction and treble damages for boycotting proprietary schools if this case is affirmed. No regulatory, constitutional or other immunization would exist for the consumer if none exists for Middle States.

Commissioner Elman raised these serious questions in *Community Blood Bank, supra:*

> "Suppose that a group of Negroes, in protest against segregated busses, boycotted the bus system . . . . Or suppose that the doctors in a medical society agreed among themselves not to prescribe thalidomide to pregnant women, or not to use a certain scalpel because it was made of inferior steel, or not to send their patients to a substandard private hospital or to one which excluded Negroes from its professional staff."

As Commissioner Elman stated earlier in his opinion, "[m]uch can be said for confining the reach of the antitrust laws to boycotts that are economic in origin, as in the group-health case [*AMA* case]." CCH TRADE REG. REP. ¶ 17,728 at 23,041-23,042.

If these and other non-commercial boycotts are subjected to the antitrust laws, the judiciary must engage in the business of determining whether consumer boycotts, minority group boycotts and other forms of concerted action by non-profit and non-commercial groups against commercial enterprises are reasonable so as to immunize the citizens involved from injunction and treble damages.

In Part I of this brief we demonstrated that special rules not yet clearly formulated must be applied when an alleged antitrust violation involves a defendant whose activities are not economically motivated, or are outside of traditional antitrust activities, or whose activities concern an area of public policy or statutory law which may offset the policy of enforcement of antitrust law. Even if the lower court properly construed the AMA decision, and conceding for the sake of argument that proprietary educational institutions are involved in trade or commerce, we believe that it is proper to limit the rule of *AMA* to cases where the defendant's activities are economically-motivated and financially self-interested. We believe that policy dictates that a rule be followed that where the defendant is not

a commercial or business entity and is not attempting by its activity to protect itself by destroying competition or is not intentionally stiffling competition, its activities should not constitute "trade or commerce" that is cognizable under the Sherman Act. Such a rule would be in accord with congressional intent and, we believe, is dictated by both public policy and the Supreme Court decisions in *Noerr* and *Silver*.

Appellant Middle States in its Brief submitted to this Court has amply demonstrated that traditionally "higher education" has not been considered as "trade or commerce" under the antitrust laws and common law. See Brief of Appellant Middle States Association of Colleges and Secondary Schools, Inc. pp. 34-44.

III. The lower court in determining whether "trade or commerce" was involved improperly defined the activity that was complained of by plaintiff.

The District Court failed to properly define the activity that was complained of and as a result found that irrelevant activities that were not complained of or questioned constituted "trade or commerce."

The heart of Webster's complaint was that due to lack of accreditation its students were frequently denied the opportunity to transfer to non-proprietary institutions and consequently Webster was restrained in attracting students to its institution. The lower court confronted this narrow complaint with a bludgeon rather than a rapier by finding that "trade or commerce" was involved for the following reasons:

> "The myriad financing considerations involved in building programs, teacher's salaries, tuitions and miscellaneous operating expenses attest to the commercialization which necessarily exists in the field of higher education. Despite the opposition of many educators, there has been a recent trend toward the organization of faculty members to bargain collectively for better

salaries and other benefits. Many institutions rent dormitory rooms and operate dining halls, book stores and other service facilities. Also there is a commercial aspect to the sharp competition for government and private contracts and the quest for research grants. In 1967-68 institutions of higher education expended more than 17 billion dollars. The projection for the year 1976-77 is 41 billion. Higher education in America today presses many of the attributes of business. To hold otherwise would ignore the obvious and challenge reality." (Opin., Paragraph 23).

The "trade" involved was thus broadly defined by the District Court despite the fact that Webster's complaint was rather limited:

> "Plaintiff claims that many accredited senior colleges and universities have rejected and will continue to reject transfer applications and credits from Webster graduates and that it is handicapped in its recruitment of high school graduates because of its lack of Middle States accreditation." (Opin., Paragraph 8).

Thus the essence of Webster's complaint is that it is unable to attract students as a result of its lack of accreditation. There is no finding that a proprietary school could benefit from accreditation except in the narrow sense that it would be able to attract students whose tuition provides the necessary profits for Webster to continue in business. Despite this limited complaint, the lower court considered a "myriad" of irrelevant facts such as collective bargaining by faculty members, research grants, building programs, faculty salaries, and the operation of book stores. While it is conceivable that a complaint that students are unable to freely transfer to other institutions brings into focus the restraint imposed upon collective bargaining by faculty members, we do not believe this is the case. The broad and amorphous field of higher education is not called into question by the facts demonstrated in the lower court. No evidence was introduced that would

compel a finding that Webster was unable to attract faculty members, or obtain funds for a building program, or properly operate dining facilities and book stores, or obtain research grants as a result of its lack of accreditation by Middle States. There was evidence which might justify a conclusion that Webster students cannot transfer to other institutions freely, although there was no finding that accreditation will unlock any doors that are not already open. Thus the justifiable findings are limited to the question of whether Middle States is unreasonably restraining the transferability of students from Webster, not whether the "myriad" of operations involved in higher education is restrained. Properly delineated, this restraint is not a restraint of "trade or commerce."

In the very recent case of *Marston* v. *Ann Arbor Property Managers Assn.*, — F. Supp. —, 1969 Trade Cases ¶ 72,862 (E. D. Mich. 1969), the plaintiffs, students at the University of Michigan, filed an antitrust action against the Ann Arbor Property Managers Association for allegedly agreeing to fix prices on apartments provided to students. The court properly recognized that a "myriad" of "trade" or "commerce" was not involved. Just as in the *Webster* case, faculty salaries, dining facilities, book store, and the organization of faculty members were irrelevant to the narrow question of whether anticompetitive housing prices that excluded students from attending the University of Michigan involved interstate commerce to an extent that brought the antitrust laws into operation. The court held that:

> "[ ]he court is unable to classify or look upon plaintiffs as being a part of interstate commerce. The fact that an individual attends a University in a state other than his own and is regarded as being part of interstate commerce is beyond the comprehension of this court. It is this court's view that there is presently no way that plaintiffs, as individuals or students, may come within the definition of 'interstate commerce.' "

Id. at p. 87,235.

Analytically the *Marston* case is indistinguishable from the *Webster* case. The *Marston* Court refused to catapult from a finding that the movement of students was unreasonably restrained to a conclusion that the entire interstate trade of higher education was being subjected to anticompetitive restraints. By its own conclusion the lower court in *Webster* finds that "higher education" involves faculty salaries, building programs, dining facilities, book stores and research grants. While this may be a justifiable conclusion, the lower court never found that faculty salaries, building programs, dining facilities, book stores, research grants and the organization of faculty members was in any way affected by Middle States' exclusion of Webster. The only concrete finding is that Webster students were restrained from transferring to non-proprietary institutions as a result of Middle States exclusionary policy.

The Supreme Court in *AMA* considered the question of "[w]hether the practice of medicine and the rendering of medical services as described in the indictment are 'trade' under § 3 of the Sherman Act." *American Medical Ass'n v. United States*, 317 U.S. 519, 527 (1943). This was the precise question, not whether the "trade" of "health care," including government grants to hospitals and medical schools, the operation of dining facilities for patients, health care literature and the sale of it, the organization of employees of institutions involved in health care, building programs, doctors' salaries, patients' fees, competition for research grants and the billions of dollars spent in this country on health care together constituted "trade or commerce". The narrow issue was whether the medical practice of fellow doctors that was restrained by the AMA constituted "trade or commerce," not whether the broad field of health care was restrained because the plaintiff was involved to some extent in the field of health care. Likewise, the lower court should have considered whether a restraint upon the transfer of students constituted a re-

straint on "trade or commerce" under the Sherman Act. With the question properly delineated, the *Marston* case clearly indicates that the flow of university students is not a flow of "trade or commerce."

The District Court also cited the *AMA* case as precedent for the principle that a question of "trade or commerce" under the Sherman Act must be answered by looking at the plaintiff's trade, not the defendant's trade. Thus the lower court decided that plaintiff Webster was engaged in trade and it was irrelevant and unnecessary to decide whether Middle States was engaged in trade. In fact, the lower court never decided that Middle States or its member-institutions were engaged in trade or commerce. If the lower court decided that Webster is engaged in trade or commerce, it is irrelevant and clearly erroneous to attribute the faculty salaries, unionization of faculty members, building programs, dining room operations, book store operations and competition for research grants and other funds, of public and private non-proprietary education, to Webster for purposes of deciding whether Webster is engaged in commerce. The "17 billion dollars" cited by the lower court as having been spent on higher education in 1967-68 was spent by non-profit institutions, not proprietary institutions. Yet immediately after citing these figures for non-profit education, the District Court states that

> "Websters rightly contends that attention should be focused on its activities rather than the defendant's because the question is not whether the defendant association is engaged in trade but whether plaintiff's trade has been restrained. The Supreme Court held in the third *AMA* case that when the organization at which the restraint is directed is in trade, it is immaterial whether the offending association is so engaged." (Opin., Paragraph 24.)

Thus, in a state of confusion, the conclusion was reached that Webster, a proprietary institution, was engaged in

commerce because Appellant's members' building programs, faculty salaries, faculty organization, housing, food and book sales and the "sharp competition" among defendant's members for government and private funds were substantial. Therefore the lower court violated the cardinal rule of *AMA* which it purported to be following, i.e., that to determine whether "trade or commerce" has been affected the Court must look at the activities the plaintiff is engaged in, not the activities the defendant is engaged in.

IV. In the context of an accrediting association composed of non-profit educational institutions, the exclusionary policy does not constitute an unreasonable restraint of trade under proper application of the "Rule of Reason".

As crystallized in *Board of Trade of City of Chicago* v. *United States,* 246 U.S. 231 (1918), the so-called "Rule of Reason" is an explicit recognition that the effect of a particular practice or policy upon competition is an incompetent determinant of legality under Section 1 of the Sherman Act in all cases. Rather, in situations where the character of the restraint is not so inherently anti-competitive as to constitute a *per se* violation of the statute, that case and its progeny demand an analysis of the particular practice challenged based upon a wide variety of factors, including the purpose, rationale, history and effect of the acts in addition to the peculiar nature of the context in which the restraint operates. *See generally,* Comment, 66 COLUM L. REV. 1486 (1966). This approach, applicable and invoked by the District Court in this case, properly consists of incisive study toward perceptive understanding of the circumstances of the restraint and is not amenable to arbitrary assumptions. See, *e.g. Appalachian Coals* v. *United States,* 288 U.S. 344 (1933).

As *generally* utilized in cases involving exclusion of the complainant from the activities or sanction of an association, application of the Rule of Reason has consisted pri-

marily of two fundamental inquiries: (1) whether the objective or purpose of the particular rule leading to exclusion is justified and permissible, and (2) whether the particular rule directly serves and is necessary to the attainment of that purpose or so exceeds in scope the promotion of that objective that it is unnecessary and therefore unreasonable in light of the competitive effects engendered by it. *E.g., Associated Press* v. *United States*, 326 U.S. 1 (1945); *United States* v. *United States Trotting Ass'n*, 1960 Trade Cases ¶ 69,761 (S.D. Ohio 1960); *Roofire Alarm Co.* v. *Royal Indemnity Co.*, 202 F. Supp. 166 (D. Tenn. 1962); *United States* v. *Insurance Board of Cleveland*, 188 F. Supp. 949 (D. Ohio 1960); *Molinas* v. *National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961).

In applying this generalized format for the Rule of Reason to the circumstances present in *Webster*, the District Court affirmed the legitimacy of the Association's objectives, the promotion of quality and maximum effectiveness of educational institutions, and based its findings of unreasonableness squarely upon the conclusion that the exclusion of profit, proprietary institutions from accreditation by the Association was irrelevant to, and did not further the quality objective of the organization. The conclusion rested upon the finding that "educational excellence is determined not by the method of financing but by the quality of the program." (Opin., Paragraph 30.) In performing this mechanical analysis, however, the Court not only ignored other objectives of the Association to which the proprietary rule may be relevant and necessary but, more seriously, denied the basic function of the Rule of Reason by wholly failing to consider the purported restraint in light of the peculiar and unique characteristics of the Association and its role in higher education.

Thus, for example, the Court paid no attention to the Association's other, "equally important" objective of stimulating and assisting institutions to reach their maxi-

mum effectiveness, as stated by the Court in its quotation from *Middle States Membership and Initial Accreditation.* (Opin., Paragraph 29.) In order to accomplish this goal, it is essential that member-institutions exchange information, participate in the solution of common problems and, especially, that they be receptive to suggestion and flexible in modification of administration and program. Clearly, the different needs and motivations of a profit-oriented proprietary school may work to limit such a school's ability and desire both to make available to other schools information which it considers a "competitive" advantage or to follow suggestions designed to stimulate its educational effectiveness which, although effective, may be unprofitable. Thus, accreditation of a proprietary school by *this* Association, which represents to the public total commitment of the institution to both quality and improvement, may well be inconsistent with this legitimate objective of the Association and thereby require exclusion of such institutions in order to achieve the goal.

Moreover, it is implicit in the nature and composition of the Association that the objective of promoting "quality" in education as a totality is to be achieved by enhancing that characteristic as to a major segment of higher education, non-profit institutions. Since, then, the goal is quality in non-profit institutions and *thereby* greater quality in education, the exclusion of proprietary schools bears a direct relation to the actual objectives of the Association since the organization was not created and is not oriented to the development of proprietary institutions. The District Court ignored this distinction in its simplistic comparison of "objective" and rule.

Secondly, and relevant to this observation, it is unquestioned that proper application of the Rule of Reason requires consideration of the particular nature of the association involved and is not achieved by a determination of the relation of rule and objective in the abstract. *E.g.*,

Apex Hosiery Co. v. *Leader*, 310 U.S. 469 (1940); *Deesen* v. *Professional Golfers' Association of America*, 358 F. 2d 165 (9th Cir. 1966); *Molinas* v. *National Basketball Association*, 190 F. Supp. 241 (S.D.N.Y. 1961). Thus, in *American Medical Association* v. *United States*, 76 App. D.C. 70, 130 F. 2d 233 (D.C. Cir. 1942), the Court considered at length the nature of the defendant and its role in the practice of medicine but found the challenged activities and rule unlawful on the basis that they had a *design and effect* of imposing economic disadvantages on those affected, with consequent direct benefits to members, unrelated to the Association's proper role. The Court stated:

> "[A]ppellants were permitted to organize to establish standards of professional conduct, to effect agreements for *self-discipline and control*. There is a very real difference between the use of such self-discipline and an effort on the part of such associations to destroy competing professional or business groups or organizations." *Id.* at 248.

It is clear from this statement and the Court's approach to the issue that the "reasonableness" of a particular rule or regulation cannot be determined simply by comparing that rule to the purpose it is to serve on an *ad hoc* basis but that this determination must reflect the particular composition, character and operation of the offending association. Thus, while the financial basis of an entity may not generally be relevant to the "quality" of its product, it may bear significant relevance and importance to the successful achievement of the unquestionably permissible goals of an accrediting association composed entirely of non-profit institutions the functions and benefits of which have been developed for and are directed towards like institutions, especially since the immediate objective is the quality of non-proprietary schools.

The pertinence of the nature and needs of the association to a determination of the reasonableness of an exclu-

sionary standard in this particular aspect is illustrated by *Deesen* v. *Professional Golfers' Association, supra,* in which financial responsibility was upheld as a reasonable prerequisite to membership. Under a sterile determination as performed by the District Court in *Webster,* financial status would have been found irrelevant to golfing ability since the internal needs of the associative entity would have been ignored. Thus, the District Court improperly failed to view the exclusion of proprietary schools in light of the particular characteristics and exigencies of the accrediting association and thereby acted in a manner inconsistent with the basic premises of the Rule of Reason. *See, e.g., United States* v. *Oregon Medical Society,* 343 U.S. 326, 336 (1952); *United States* v. *United States Trotting Assn.,* 1960 Trade Cases ¶ 69,761 (S.D. Ohio 1960); *cf. Structural Laminates, Inc.* v. *Douglas Fir Plywood Ass'n,* 1966 Trade Cases ¶ 71,890 (D. Or. 1966); *Kolb* v. *Pacific Maritime Ass'n,* 141 F. Supp. 264 (D. Cal. 1956).

It is unquestionably apparent that the issues raised and the factual context set forth in this proceeding are unlike those found in the vast majority of cases involving exclusion from associative activities. Here, the offending organization is composed of members which have never considered themselves competitors, are not profit-making or profit-oriented businesses with a consequent absence of economic motivation, and concerning which there is not one scintilla of evidence of purpose or intent to adversely affect the competitive efficiency of, or even of interest in, the complaining excluded organization. Thus, the situation is virtually unique since there is not only a lack of economic motivation in the exclusion (a statement not inconsistent with the opinion of the District Court), *compare American Medical Association* v. *United States, supra,* but also an absence of any purpose or intent to restrain the plaintiff, *compare, Council of Defense of State of New Mexico* v. *International Magazine Co.,* 267 F. 390 (8th Cir. 1920) (also involving a lack of economic benefit to the as-

sociation). Clearly, then, the case does not lend itself to mechanical application of general principles developed in situations with wholly different factual aspects.

Thus, while purpose is generally of only collateral significance, it has been recognized in cases involving professional associations and other organizations, the primary role and function of which is not participation in the competitive or economic operations of an industry or business, that the intent and purpose of such an organization in utilizing the challenged practice is highly pertinent to the reasonableness of its competitive effect. *See, American Medical Association* v. *United States,* 317 U.S. 519 (1943): *United States* v. *United States Trotting Association, supra; cf. Community Blood Bank of Kansas City Area, Inc.,* 1967 Trade Reg. Rep. ¶ 17,728 (FTC Dkt. 8519). In *American Medical Association,* the Supreme Court observed:

> "[T]he . . . occupation of the individual physicians charged as defendants is immaterial if the *purpose and effect* of their conspiracy was . . . obstruction and restraint . . . ." 317 U.S. at 528. (emphasis added)

and later quoted favorably from the charge of the District Court in that case as follows:

> "If it be true . . . that the District Society, acting only to protect its organization, regulate fair dealing among its members, and maintain and advance the standards of medical practice, adopted reasonable rules and measures to those ends, *not calculated to restrain Group Health,* there would be no guilt, though the indirect effect may have been to cause some restraint against Group Health." 317 U.S. at 533. (emphasis added).

The direct implication of these statements is that a purported restraint engendered by one of these special types of associations is affected, in determining "reasonableness," by the presence or absence of intent or purpose to restrain. Of course, purity of purpose cannot alone pro-

vide antitrust immunity, but the failure of the District Court to consider absence of improper intent as bearing upon "reasonableness", coupled with the failure to consider the exclusionary rule in the particular context of the defendant Association, further indicates the Court's cavalier application of the Rule of Reason.

Moreover, the District Court did not give proper consideration and weight to the character of the challenged restraint or its effect upon Marjorie Webster Junior College. The challenged regulation of the Middle States Association is that providing for non-inclusion of proprietary institutions but, the restraint relied upon by Plaintiff and the District Court consists primarily of the contention that non-accreditation by the Association adversely affects Webster by limiting the ability of its students to transfer credits. Thus, it may be initially noted that the restraint is, at best, an indirect result of the rule. This is especially so as there is no finding by the Court that the members of the Association agreed to refuse transfer of credits on the basis on non-accreditation, that there was any concerted activity whatsoever in refusing transfer, or that the exclusionary rule was ever related to the refusal of credit transfer on the part of any member institution. Consequently, this case is wholly unlike the direct restraints operative in the *AMA* proceedings or the one similar case previously before this Court, *Levin* v. *Joint Commission on Accreditation of Hospitals*, 122 App. D.C. 383, 354 F. 2d 515 (D.C. Cir. 1965).

Thus, in *American Medical Association* v. *United States*, 76 App. D.C. 70, 130 F. 2d 233 (D.C. Cir. 1942), *aff'd.*, 317 U.S. 519 (1943), the restraint activated by the defendant constituted, and was intended to constitute, a direct and effective limitation on the ability of doctors participating in Group Health to practice medicine. There, as in other pertinent decisions, *see, e.g. Associated Press* v. *United States*, 326 U.S. 1 (1945); *Union Circulation Co.* v. *FTC*,

241 F. 2d 652 (2d Cir. 1957); *United States* v. *Insurance Board of Cleveland*, 188 F. Supp. 949 (N.D. Ohio 1960), the nature and effect was to deny or significantly limit the ability of the excluded entity or group to actually participate in some substantial aspect of the competitive market. In *Webster*, conversely, the alleged effect of the exclusionary rule upon student transfer (the primary basis for the District Court's decision) is not only unproven but bears no discernible relation to myriad other aspects of the "business" of higher education. It is a perversion of the Rule of Reason, as developed through extensive and varied litigation, to conclude, as did the District Court, that Webster's "trade" in higher education was restrained without any finding whatsoever that the school's freedom of operation within the "marketplace" was affected and with emphasis solely upon a minor and tangential incident of education in which no actual restraint was proven.

This tenuous relation between the exclusionary rule and its purported restraining effect becomes of even greater importance in light of the fact that the adverse effects claimed to result are illusory. Thus, the Court ignores the fact that all other womens' colleges in the District of Columbia have also experienced decreases in applications since 1966 for a number of cogent and logical reasons, that Webster has had exceptional business success and has increased profitably consistently over the period of the challenged restraint, and other facts indicating the operation of other causes resulting in the events which Webster seeks to blame upon the Association or demonstrating the irrelevance of the rule to Webster's success and profit. (As more fully set forth in Appellant's Brief, pp. 18-23.) Clearly, by failing to analyze completely and substantively the actuality of the alleged restraints caused by the Association rule, the District Court failed to observe both the spirit and letter of the Rule of Reason. *Compare*, *Board of Trade of City of Chicago* v. *United States*, 246 U.S. 231 (1918); *Appalachian Coals, Inc.* v. *United States*, 288 U.S.

344 (1933). The District Court wrongly failed to answer the essential question implicit in the following conclusion in *Hughes Tool Co.* v. *Motion Picture Association*, 66 F. Supp. 1006 (S.D. N.Y. 1946):

> "The violation of the Sherman Act, if any, in other words, is not the cause or the means by which this case has been brought about. The violation has not occurred, nor damaged plaintiff in any respect, which would seem to be a pre-requisite to enable plaintiff to recover under the provisions of that law." *Id.* at 1013.

In summary, the District Court improperly ignored its duty to consider the propriety of the exclusionary rule within the particular facts of the Association context, to consider the absence of improper purpose or intent in this unique factual situation and, especially, to accurately analyze the character and extent of the alleged restraint. As a proper application of the Rule of Reason could not result in determining Appellant's exclusionary rule to be "unreasonable", the decision of the District Court is incorrect and should be reversed.

CONCLUSION

For the foregoing reasons, we submit that the decision of the District Court is incorrect and that this Court should overrule and reverse that judgment.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23351

MIDDLE STATES ASSOCIATION OF
COLLEGES AND SECONDARY SCHOOLS, INC.,

Appellant

vs.

MARJORIE WEBSTER JUNIOR COLLEGE, INC.,

Appellee

On Appeal from the United States District Court
for the District of Columbia

BRIEF AS AMICUS CURIAE
of
NORTH CENTRAL ASSOCIATION OF COLLEGES AND
SECONDARY SCHOOLS, a corporation not for profit

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IN THE
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THE REASON FOR NORTH CENTRAL'S INTERVENING

NORTH CENTRAL ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, which is filing this BRIEF AS AMICUS CURIAE, is a corporation not for profit, organized under the laws of the State of Illinois and is engaged within the nineteen states of the United States in its area of operation in the develop-

ment and maintenance of high standards of excellence for universities, colleges and secondary schools, the continued improvement of the educational program and the effectiveness of instruction on secondary and college levels through a scientific and professional approach to the solution of educational problems, the establishment of cooperative relationships between the secondary schools and colleges and universities within the territory of the Association, and the maintenance of effective working relationships with other educational organizations and accrediting agencies. Its organization and method of operation are similar in most respects to those of Appellant. Its only source of revenue to carry on its operation is the membership fees paid by its members pursuant to its by-laws. It has 554 members which are non-profit or public institutions of higher education and also 3,763 senior high schools which are members in the states of Arizona, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, West Virginia, Wisconsin and Wyoming.

This Association (North Central) has been in operation carrying on its activities since about 1900, first as an unincorporated association, and since 1963 as a corporation not for profit. Until the decision in this case now being appealed, it has always been the opinion of North Central that its activities and those of the Middle States and other

comparable accrediting associations as well as the activities of all the colleges, universities and secondary schools in the United States were exclusively activities in secondary and higher education, were not in any respect business or trade, and were not within the scope of the Sherman Antitrust Act.

THE PRIOR LAW APPLICABLE TO SECONDARY AND HIGHER EDUCATION

Insofar as North Central can ascertain, there has been no decision of any court heretofore either in the United States or in England deciding and holding that the field of education, both secondary and higher education and of the colleges and universities engaged therein, were and are business or trade or commerce within the meaning or scope of the Sherman Antitrust Act, or of any similar act.

Indeed, the Courts in the past have excluded learned professions and higher education from the scope of Sections 1 and 3 of the Sherman Act. This is clearly stated in the opinion of United States vs. Real Estate Boards, 339 U.S. 495 at 490-491 where the Court in its opinion said, in referring to the scope of Section 3 of the Sherman Act, that the Act was aimed at combinations organized and directed to control of the market by suppression of competition in the marketing of goods and services.

"Justice Story in The Nymph, 18 Fed.Cas. 506, while construing the word 'trade' in the Coasting

and Fishery Act of 1793, 1 Stat. 305, said,

> 'The argument for the claimant insists, that 'trade' is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion, that such is not the true sense of the word, as used in the 32nd section. In the first place, the word "trade" is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, <u>not in the liberal arts or in the learned professions,</u> it is constantly called a trade. * * * '" (Emphasis ours)

In the opinion of North Central, if the decision now being appealed in this matter were upheld, it would be extremely detrimental to the cause of higher education and would give an unlimited scope to Sections 1 and 3 of the Sherman Antitrust Act contrary to the intent of the Sections and the prior decisions construing them. Higher educational institutions would be irreparably damaged by this Court-made legislation which clearly departs from the legislative history of the Sherman Act. That damage would adversely affect the public interest in higher education.

Although there are no direct decisions we can find on this particular point, we believe it is well to point out certain distinctions in some of the authorities relied upon by the lower court and also to mention certain other decisions which are directly contrary to the view taken by the lower court.

The lower court placed considerable reliance upon the American Medical Association cases cited in its opinion. The facts in those cases are strikingly different from the facts brought out in the trial of this case. Those cases involved a concerted plan by the American Medical Association and its local association which effectively interfered with and prevented members of the medical profession from carrying on their practice to such an extent that the court concluded there was in effect a monopoly and restraint which justified the action which the court and jury took. In the opinion of the American Medical Association v. United States, 317 U.S. 519 at 533, the Supreme Court referred with approval to the lower court's charge to the jury which was as follows:

> "Was there a conspiracy to restrain trade in one or more of the ways alleged ? * * * If it be true: that the District Society acted only to protect its organization, regulate fair dealings among its members, and maintain and advance the standards of medical practice, adopted reasonable rules and measures to those ends, not calculated to restrain Group Health, there would be no guilt though the indirect effect may have been to cause some restraint against Group Health." (Emphasis ours)

The facts in the case below do not show any such action on the part of Middle States. On the contrary, they show simply that Middle States, a voluntary association having numerous colleges and universities and secondary schools as its members, and following the provisions of its by-laws and regulations, refused to accept an application for membership from Marjorie

Webster Junior College. There are no facts whatever in the record of restraint against Webster in the carrying on of its enterprise; on the contrary, the facts show that during the period in question, particularly the last few years, Webster has had a more profitable operation of its school, increased its enrollment of students, and had a higher net return than at any time in its history. The record also shows that during the last year or two, Webster has declined the applications of more students who wished to enroll than it had previously. It would seem clear that these facts refute any claim of restraint or interference by Middle States of Webster's operations. (Middle States' brief contains ample references to the Record on these points, hence we shall not repeat them.)

Two cases decided by the United States Court of Appeals for the 8th Circuit and in which certiorari was denied by the Supreme Court are, in our opinion, directly contrary to the opinion and decision of the lower court in the instant case insofar as it applies to the Sherman Antitrust Act. One of those cases is Riggall, Appellant v. Washington County Medical Society, et al, 249 F.2d 266, cert. den., 355 U.S. 954. In that case the court denied relief to a duly licensed physician and surgeon who sought relief under the Sherman Antitrust Act on the ground that the defendant Medical Society had refused to admit the plaintiff to membership in the Society. In its opinion on p. 268 the Court of Appeals ruled that the practice

of his profession was neither trade nor commerce under the Sherman Antitrust Act and that the actions of the defendants did not result in a monopoly under the Act. In part the Court said:

> "Plaintiff has not been prevented from practicing his profession, but in the final analysis his complaint is that he could practice it more profitably but for the acts of the defendants. The Sherman Antitrust Act was not primarily to protect the individual but to protect the general public economically, and a private party may not recover under the Act unless there has been an injury to the general public economically."

Although Webster and the lower court in the instant case relied upon Section 3 of the Sherman Act, the findings in the opinion indicate quite clearly that the court found no acts of conspiracy on the part of Middle States. It would seem entirely unreasonable to hold that the mere failure of Middle States to accept Webster's application constituted a conspiracy under Section 3 of the Sherman Act.

The other case from the Court of Appeals for the 8th Circuit is that of Elizabeth Hospital, Inc. v. Richardson, et al, 267 F.2d 167, cert. den., 361 U.S. 884. The decision in this case was by the same court as the decision in the Riggall case cited, and was to the same general effect.

The opinion of the trial court in the instant case seemed to put considerable emphasis on what it assumed to be the fact, namely that Middle States occupied such a strong position in the area in which it operated that that fact alone constituted a monopoly against which Webster was entitled to relief. Although the issues involved are entirely different from the

issues in the instant case, a statement by the trial court in the case of Bailey's Bakery, Ltd. v. Continental Baking Company, 235 F.Supp. 705 (1964) decided by the District Court for the District of Hawaii seems applicable in refutation of the trial court's view just mentioned. On p. 718 of that decision the court said:

> "The Sherman Act does not make mere size nor continued exercise of its lawful power an offense when that size and power have been obtained by lawful means and developed by natural growth -- absent the manifest purpose or intent to exclude competition." (affirmed 401 F.2d 182; Cert. Denied 89 S.Ct. 874)

The facts in the instant case show there was no competition between Middle States and Webster and also that there was no attempt by Middle States to interfere with Webster's carrying on of its operation as a school.

We respectfully submit that the judgment of the trial court should be reversed and that the Appellee's complaint should be dismissed in its entirety.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARJORIE WEBSTER JUNIOR COLLEGE, INC., Plaintiff-Appellee v. MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC., Defendant - Appellant	NO. 23351

United States Court of Appeals
for the District of Columbia Circuit

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BRIEF FOR THE

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and the
AMERICAN BAR ASSOCIATION
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SUMMARY OF ARGUMENT

The case presents issues of the utmost importance to American higher education. At stake here is not merely the judgment of the Middle States Association concerning its own membership policies, significant though that question surely is. Equally implicated are judgments about standards and performance in higher education made by the five other regional accrediting associations and nearly thirty professional accrediting groups.

The significance of this case also goes far beyond the particular standard of membership challenged here. If, as the District Court has held, judicial judgments about the propriety of accrediting standards may supplant the expert judgments of professional educators and others qualified by experience in accreditation in their fields, then the door has been opened for review of countless decisions heretofore reserved to the specialists, most of them from the academic community. Higher education deserves no unique immunity from judicial review. Nor has it sought such an immunity in those contexts in which review serves vital public interests and invokes settled judicial standards. But the circumstances of the present case militate strongly against judicial intervention.

Accreditation of colleges and universities is an important activity with far-reaching consequences both for individual institutions and for those who deal with them. The entire process of accreditation - including the probing internal self-evaluation every applicant must conduct - represents a unique and vital exercise of self-government within the American academic community. The fact that accreditation is carried out by government agencies in Europe and elsewhere underscores the special

character of these non-governmental associations in the United States. Legislatures have consistently respected this process of self-government; government agencies on occasion rely on the judgments of accrediting agencies, and they have been scrupulously careful not to interfere in the processes by which those judgments are reached.

Both precedent and the circumstances of this case counsel a very narrow, restricted scope of review of decisions of an accrediting association to exclude applicants. For several reasons, which we shall develop, courts have traditionally been reluctant to probe the internal affairs of a true voluntary association in the absence of clear evidence of abuse of the association's power over members and others. While special circumstances might warrant judicial inquiry, such circumstances are not present in this case. There have, for example, been no claims that the particular standard in question was applied in an uneven or discriminatory fashion, or that it was invoked unfairly or without notice to the plaintiff. Thus there is simply no occasion for a court to reach the issue whether the exclusion of proprietary institutions is a reasonable or unreasonable policy - a matter on which amici deems it unnecessary to take any position.

<u>The District Court has applied an improper test for review of accreditation standards</u>.

On two interrelated grounds - the relevant general principles of law and the particular circumstances of this case - we contend that the inquiry of the District Court was improperly broad.

A. <u>The scope of review of policies of accrediting associations should be extremely limited</u>. The scope of review in such a case should be very narrow indeed, whether the defendant be regarded as a private

voluntary association or as a quasi public body subject in some instances to constitutional commandments. We shall develop both branches of the argument on the basis of general law before exploring the particular circumstances of this case which reinforce that contention.

The standard of review governing a challenged exclusion from a private association seems well settled. Courts have paid a special deference to the adoption and application of standards by experienced and respected professional associations. Such deference is reflected in the prior proceedings concerning college accreditation. In the Parsons College litigation the court concluded, after finding no basis to overturn the judgment of the North Central Association:

> In this field, the courts are traditionally . . . hesitant to intervene. The public benefits of accreditation, dispensing information and exposing misrepresentation, would not be enhanced by judicial intrusion. Evaluation by the peers of the college, enabled by experience to make comparative judgments, will best serve the paramount interest in the highest practicable standards in higher education. <u>Parsons College</u> v. <u>North Central Association of Colleges and Secondary Schools</u>, 271 F. Supp. 65, 74 (N.D. Ill. 1967).

The reluctance of courts to upset standards adopted by such associations rests upon two complementary premises - the one, that standards adopted by experienced professionals for the governance of their own field of activity are entitled to a special deference; and the other, that courts risk making unsound or unwarranted judgments

about regulatory areas with which they are unfamiliar. The case for deference based upon professional expertise has been well summarized recently:

> Accrediting agencies . . . set general standards and require that schools meet those standards to be eligible for accreditation. This standard-setting role necessitates expertise. The educators and members of the profession set the standards and formulate the policies for enforcing them, and courts, lacking such expertise, should be reluctant to interfere. If the agency is functioning for the benefit of the public and, to that end, its standards are cast in the public interest, judicial scrutiny should yield to the competence of the accrediting specialists. Comment, <u>The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation</u>, 52 Cornell L. Q. 104, 114-15 (1966).

Another recent comment agrees, suggesting that "the special competence of the association must be considered as a factor in determining the appropriateness of the group as a vehicle in achieving the goal . . . ." The comment continues:

> In setting standards for a profession, neither the general public nor any other group will generally approach the competence of the profession's own association, and this pre-eminence may extend to closely related matters . . . . A similar gulf may

exist between the competence of a trade association and that of the general public. Developments in the Law — Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 1046 (1963).

The other basis for judicial caution is really the reverse of the same coin. Forty years ago Zechariah Chafee warned against judicial entry into what he termed the "dismal swamp" of private associations whose rules and procedures were unfamiliar to courts called upon to review exclusions or expulsions. In such cases, he argued, "the injury to the member may be outweighed by the enormous amount of time and effort required for the decision of the case." Chafee, The Internal Affairs of Associations not for Profit, 43 Harv. L. Rev. 992, 1023 (1930).

The question remains, however, whether and how private associations may forfeit such deference by abusing their power over members and applicants. In the one accreditation case to reach a federal Court of Appeals, the Seventh Circuit suggested that deference is due at least to a standard or rule "reasonably related to the effectuation of the commendable educational policies of the Association"; and that accreditation decisions should be set aside only upon proof that they "were arrived at arbitrarily and without sufficient evidence to support them . . . ." North Dakota v. North Central Association of Colleges and Secondary Schools, 99 F.2d 697, 700 (7th Cir. 1938). It seems quite clear that the District Court in this case did not follow that test in determining the validity of the proprietary rule. Rather, the court held that rule unreasonable because in some cases it might exclude profit-making institutions more "efficient" than some nonprofit schools that were accredited.

This judgment seems open to several challenges. First, it is necessarily wholly speculative; there was no demonstration in the District Court that the plaintiff, or any other proprietary institution now in existence, is in fact more "efficient" than any or all institutions currently accredited by Middle States. Second, and far more important, efficiency per se has never been a criterion or an objective of Middle States or any other accrediting association. Thus to conclude, as did the District Court, that the exclusion of proprietary schools is irrationally related to the Association's purposes, not only substitutes the judgment of the Court for that of the Association regarding that relationship, but actually attributes to the Association a purpose it does not have - to promote efficiency as such. Meanwhile, nothing in this case supports the inference that the proprietary rule fails to serve, and serve well, the essentially educational and academic objectives of the Association - objectives with which a quest for pure efficiency might well be in direct conflict. The Association has placed its emphasis upon a set of goals well understood and widely shared within the American academic community. It has determined that pursuit of private profit is incompatible with those goals.

The decision of the District Court in this case well illustrates the dangers of judicial intervention in academic judgments about accreditation standards. Even if it were appropriate for a court to test the nexus between a rule of membership and the Association's objectives in a case presenting special circumstances, it would be clearly inappropriate under any conditions for the court to make an independent determination of the validity of the objec-

tives themselves. Yet that seems to be precisely what has happened in this case. The District Court struck down the proprietary rule not because it was irrationally related to the stated goals of Middle States - but really, instead, because Middle States paid what the court deemed insufficient attention to "efficiency" in higher education. That is a judgment for the academic community, and not the courts, to make.

Essentially the same standards of review should govern this case even if the decision of an accrediting association be deemed state action - a question on which amici take no position. The Supreme Court has held that certain formally private entities exercise either delegated governmental power or perform so inherently public a function that their acts must meet constitutional criteria. This principle has been applied, for example, to certain labor unions, Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); to company towns, Marsh v. Alabama, 326 U.S. 501 (1946); and to primary and pre-primary elections in one-party states, Terry v. Adams, 345 U.S. 461 (1953). Even if the principles of those cases govern here, there is no basis to overturn the challenged rule.

Because the labor union involved in the Steele case may not refuse to represent Negro laborers in the bargaining unit, it does not follow that the same union must admit foremen or supervisors in the same shop; exclusion of such personnel is an inherent attribute of collective action in the labor field. Nor does it follow that a company town which cannot bar the distribution of religious literature on its streets must make housing available to a person not employed in the plant for which the town was built. The "private" Democratic pre-

primary enjoined in the _Terry_ case from excluding Negroes surely is not compelled by the Constitution to admit registered Republicans, regardless of their color.

In each of these cases there is an implied exception for qualifications of membership that are within the range of permissible associational decisions, and are not arbitrary. Quite clearly the exclusion of proprietary institutions is equally within the range of rational action permitted to a voluntary accrediting association. Thus a finding that decisions of the Middle States Association constitute state action - a matter on which amici express no view whatever - would in our judgment not weaken the case for reversal.

B. _No special circumstances warrant a broader standard of review in the present case_. The general principles to which we have referred above would surely govern the present case unless some special considerations compel a departure from them. There are, however, no such special circumstances involved here. First, it is noteworthy that this case involves the _exclusion_ of an applicant for membership, not the _expulsion_ of an existing member. Courts have consistently recognized the propriety of a narrower standard of review in the former context than the latter. There is a marked difference between intervention to prevent the wrongful destruction of an existing status and to enforce an expectation of future membership, _Higgins v. American Society of Clinical Pathology_, 51 N.J. 191, 238 A.2d 665, 669 (1968).

Second, there is no claim that the proprietary standard has been improperly applied in this case. The matter might be quite different if any substantial doubt existed whether Marjorie Webster

was in fact a proprietary institution. Various borderline cases may be imagined in which judicial inquiry or an internal hearing would help to resolve disputed factual claims. But no such doubts exist here. Plaintiff readily concedes it is a profit-making institution; it has at least once drafted and submitted to Middle States a non-profit charter but then decided to remain proprietary. So there is clearly no issue whether or not the standard in question applies to this case.

Third, there is no contention that the proprietary standard applies irrationally to Marjorie Webster. The case might be different if plaintiff had shown that its profit-making character nonetheless avoided all that Middle States sought to prevent by adopting this criterion. In such a case, judicial review might be warranted to determine whether the standard should be waived or relaxed because its application to a particular institution was irrational or unrelated to the underlying purposes. But there is no such claim here. Rather, plaintiff attacks the standard head on, claiming it is unreasonable as applied to all proprietary institutions, despite the dangers and conflicts that caused its adoption many decades ago.

Fourth, there has been no suggestion that the standard is being unevenly or inconsistently applied, or that Marjorie Webster has been the victim of discrimination. Since the rule went into effect, its application has been quite consistent and uniform. Nothing is made here, nor could it be, of the presence within Middle States of three proprietary secondary schools; they were accredited before the present rule was extended to the secondary level.

Finally, there has been no claim that the proprietary standard was invoked without adequate notice, or by surprise, or in violation

of the procedural rules of the Association. No hearing has been held on the Marjorie Webster application because there is no question of fact to be tried. The issue is purely whether or not the Association may offer membership and grant accreditation only to non-profit institutions.

This case might be viewed in a slightly different posture, which would warrant an even narrower test of review. Arguably, the non-profit requirement represents not so much a quantitative or qualitative standard to be applied in judging applicants for accreditation, but rather a definition of the scope and character of the Association which traditionally and consistently has confined its membership to non-profit institutions. Should the proprietary rule be so regarded, sweeping judicial review would even more clearly be inappropriate, where, as here, there is no limitation of accreditation on grounds that might be inherently improper, such as a limitation along racial lines.

CONCLUSION

For the foregoing reasons, amici curiae respectfully urge this Court to reverse the decision of the District Court. We contend that whatever may be the circumstances warranting judicial review

of a denial of accreditation, such circumstances are surely not presented in this case.

Respectfully submitted,

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case relate substantially to this obligation and function.

STATEMENT OF AAUP ASSOCIATION WITH BRIEF AMICUS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND THE AMERICAN BAR ASSOCIATION

The AAUP in appearing as amicus wishes to state its association with the position set forth in the brief amicus filed in the instant case by the Association of American Law Schools and the American Bar Association.

Respectfully submitted,

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October 24, 1969

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23351

MIDDLE STATES ASSOCIATION OF
COLLEGES AND SECONDARY SCHOOLS, INC.

Appellant

vs.

MARJORIE WEBSTER JUNIOR COLLEGE, INC.

Appellee

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF AMICUS CURIAE

PENNSYLVANIA ASSOCIATION OF
COLLEGES AND UNIVERSITIES

United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF ISSUES PRESENTED

1. Whether higher education is trade or commerce, and evaluation and accreditation a business service and an economic necessity, within the meaning of the Sherman Act.

2. Whether the lack of any ascertainable monetary damage or other injury to a proprietary institution of higher education, entitles such proprietary institution to injunctive relief under the Sherman Act.

STATEMENT OF THE CASE

Plaintiff-Appellee Marjorie Webster Junior College, Inc. (Webster) is a for-profit, business corporation of the District of Columbia, owned and controlled by the members of one family, who hold most of the administrative and corporate offices in the corporation and institution and who are its sole stockholders. Established in 1920 as a school of physical education and expression, Webster was incorporated in 1947 as a junior college for women. It has successfully operated as such to the present without evaluation and accreditation by Defendant-Appellant Middle States Association of Colleges and Secondary Schools, Inc. (Middle States).

Middle States was incorporated as a non-profit educational organization under the New York Education law in 1966. Its predecessor, an unincorporated association, has been in existence since 1886.

In June 1966 Webster sought equitable relief - and no damages - against Middle States under Section 3 of the Sherman Antitrust Act (Count 1) because Middle States refused to consider Webster as eligible for evaluation and accreditation stating as its reason that the latter was not a non-profit or public institution with a Board of Trustees representing the public interest. Webster subsequently amended its Complaint to add a count claiming that Middle States' eligibility criteria was unjust, arbitrary, and unreasonable and that Webster was entitled to equitable relief therefrom because of Middle States' status as a quasi-governmental organization (Count 2).

After extensive discovery, motions for summary judgment filed by both Webster and Middle States in October, 1968, were denied on December 6, 1968. Trial commenced February 24, 1969 and ended May 5, 1969, with over 7,000 pages of transcript and several hundred exhibits. The entire record has been certified to this Court.

The Trial Court's decision was issued July 23, 1969. Relief was granted to Webster under both counts of the Amended Complaint.

On July 30, 1969 Middle States filed a petition for stay pending appeal. A stay was denied by the District Court. On appeal, this Court stayed the order of the District Court to December 22, 1969.

STATEMENT OF FACTS

Middle States is a voluntary, non-profit, non-stock, educational corporation, organized under the education laws of the State of New York, and incorporated by the Board of Regents of the University of the State of New York on May 27, 1966. (FF 9).[1]

The membership of Middle States consists primarily of institutions of higher education and secondary education which have been accredited by Middle States. Membership is concomitant with accreditation. (FF 13). The primary goal of each Middle States Commission is to increase the effectiveness of educational institutions. (Jones. Tr. 5578, McCormack, Tr. 4163).

Its membership of institutions of higher education includes 346 non-profit institutions (universities, colleges, junior colleges and specialized institutions) in Delaware, Maryland, New Jersey, New York, Pennsylvania, District of Columbia, Puerto Rico and the Canal Zone. Of these, 106 are state or municipal universities, colleges or junior colleges, 83 are private non-sectarian institutions, 137 are private church related or controlled universities, seminaries or junior colleges, 15 are specialized institutions with concentrated courses of instruction in music, optometry, pharmacy and textiles, one is a special private institution for the deaf, three are federally sponsored military academies and one is a federally sponsored junior college. (FF 14).

Middle States is one of six regional accrediting associations (FF 16). The other five regional associations are the New England Association of Colleges and Secondary Schools, Inc., the Southern Association of Colleges and Secondary Schools, Inc., the North Central Association of Colleges and Secondary Schools, Inc., the Western Association of Schools and Colleges and the North Western Association of Secondary and Higher Schools.

The evaluation and accreditation process of Middle States is carried on through two constituent commissions - the Commission on Institutions of Higher Education and the Commission on Secondary Schools.

The Middle States Higher Commission does not accredit all post secondary educational institutions. Its scope of operation is defined by eligibility requirements which limit the types of institutions which can apply to it for accreditation. These eligibility requirements are not arbitrary limitations, but rather have grown out of the nature of the Higher Commission's evaluative and accrediting process.

1 Findings of Fact of Trial Court (FF).

At least since 1928, Middle States has specifically required that, to be eligible for accreditation, an institution of higher education must be non-profit with a governing board representing the public interest. (FF 25). At no time in its existence has the Higher Commission of Middle States evaluated or accredited a proprietary institution. (FF 25).

Profit-making corporations engaged in higher education cannot be evaluated with the standards developed by Middle States because they have a *double* goal-education *and* profit-making. (McCormack, Tr. 4195). The goals of profit and of providing the best possible education utilizing the total resources of the institution are incompatible. (Everett, Tr. 5154). What is economically efficient is not necessarily educationally efficacious. Indeed, the two may be at cross purposes. (Blum, Tr. 4880). The proprietary institution has a conflict of interest by its very organization and operation. (Jones, Tr. 5580, Stoops, Tr. 5218, Brubacher, Tr. 4437-4438).

The essential goal of a profit-making corporation is to return profit on an invested capital. Profit is the corporation's prime responsibility. (Everett, Tr. 5155). Thus,

> "*If they* (the two goals of profit and education) *are both in the same institution, it is quite obvious that a question of a return on capital must be the first and primary consideration because if the capital leaves the institution, the institution no longer exists for whatever secondary and tertiary function it may try to provide and so that a primary profit motive, which all profit organizations must necessarily have to survive, would seem to be to make the educational goal or the educational motive secondary.*" (Everett, Tr. 5153) (Emphasis added).

The configuration of the profit-making corporation is critically different from that of the non-profit college or university. The decision-making structure is simpler. The governing body, the Board of Directors, is elected by and responsible to a body outside the corporation - the owners or stockholders. Their duty is to maximize the return on the capital of the stockholders. They appoint executive management to conduct the day-to-day activities of the corporation, and to carry on its business in the most profitable way possible. Each decision is weighed in terms of the most profitable alternatives. (Blum, Tr. 4848-4849).

The Marjorie Webster School of Expression and Physical Education was founded in 1920. In 1927, the school was incorporated for profit under Sec. 599 of the Act of March 3, 1902, presently 29 D.C. Code Secs. 601-606 providing for the formation of charitable, educational and religious associations, as corporations for profit. In 1930 the name was changed to "Marjorie Webster Schools, Inc." In 1947 the D.C. Board of Education, allegedly

pursuant to 31 D.C. Code Sec..120, accredited Webster as a junior college and, in spite of the fact that it was not incorporated under 29 D.C. Code Sections 401-420, authorized it to grant the Associates in Arts degree. Thereafter, the name was changed to Marjorie Webster Junior College, Inc.

Webster currently offers two year terminal and transfer courses. There are seven departments of instruction: Art, Communications (Speech-Drama and Radio-TV), Kindergarten Education, Liberal Arts, Physical Education, Secretarial and Retail Merchandise. (Stipulation 5). Out of 500 students enrolled in Webster in the academic year 1966-67, 18% of the student body were in the liberal arts department. (Stipulation 5.1).

The "basic charge" for resident students at Webster covering room, board, tuition, all athletic activities, and local supervised field trips, was $2,800 in 1967-68 and $2,900 in 1968-69. (Stipulation 5.2).

Webster is one of 35 proprietary institutions of higher education in the United States. These institutions have about 30,000 of the six million students enrolled in the 2,500 American institutions. Webster is one of two proprietary institutions (out of a total of 26) in the District of Columbia. These two proprietary institutions have about 2,000 students, out of a total of 75,000 college and university students in the District.

The Board of Directors of Webster consists of five members of the Webster family, who also are its stockholders. Except for an eight-month period in 1966-1967, all of the principal officers and administrative officials at Webster have been members of the family, elected each year by each other. Over $110,000 in salaries is paid out each year to these five persons, and all but one other adult member of the family also are employed at the institution.

In 1965-66, Webster paid out $165,743 in salaries to a faculty consisting of 36 persons some of whom are part time; the average salary overall is $4603.97. (Stipulation No. 31.2). In 1965-66, the median contract 9 months' salary for private women's junior colleges was $6,664, and for public women's junior colleges $7,830. (Stipulation No. 41.1). Webster provides no tenure for any of its faculty members. Each faculty member is retained on a one year contract by Webster.

Thirty percent of Webster's expenditures go to proprietary status related items - expenditures which would not be incurred by a non-profit institution. (Hobson, Tr. 4651, DX 215). This means a student only receives 70 cents out of every dollar of tuition paid in the form of education. With regard to educational and general expenditures, 60.2%

of expenditures are devoted to administration and general items; only 28.3% is devoted to instruction, and only 0.4% to library. (DX 215). Included in the administrative and general item are the salaries paid the Webster family. The normal breakdown for educational and general expenses would be 20% to 30% for administration, 45 to 55% for instruction and 3 to 6% for library. (Hobson, Tr. 4785).

These figures contrast sharply with aggregate percentages for two-year private institutions in the United States. Taking the aggregate of all such institutions in the United States, only 29.6% of educational and general expenditure is devoted to administrative and general in contrast to Webster's 60.2%. 42.5% is devoted to instruction as opposed to Webster's 28.3%. The Mideast region shows 30.7% for administration and general, 44.4% for Instruction, and 4.2% for library. (DX 216). This exhibit was erroneously excluded by the Court on the basis that the aggregates contained both non-profit and profit-making colleges. (Tr. 4751, 4763). 4% is devoted to the library as opposed to Webster's 0.4%.

Middle States has never been used by its members to protect their interests against those of outside institutions. The Higher Commission has welcomed a large number of new institutions - including a great many community colleges - to its membership. There has never been any resistance to this on the part of older member institutions in the area of the new institutions. What Webster would characterize as the "competitive threat" of new institutions has never even been the subject of discussion at any meetings of the Association or the Commission. (Carter, Tr. 3592). Only educational reasons have resulted in institutions seeking accreditation being turned down. (Carter, Tr. 3592-93).

No conspiracy existed to restrain the trade of proprietary institutions in general or Webster in particular. (Elkins, Tr. 3656; Carter, Tr. 3588-89). There has never been any fear within Middle States of a "competitive threat" from proprietary institutions (Crawford, Tr. 2189). The effect that proprietary institutions would have-on member institutions was never discussed at any meetings of the Association or the Higher Commission.

This situation the Court acknowledges (Para. 25):

> "* * * Plaintiff does not contend that the members of Middle States conspired specifically to restrain its trade nor that the six regional associations formed the Federation for that purpose. The evidence negates the existence of any evil, purposeful plotting by the defendant and Webster concedes that the reason for combining was honorable and laudable."

ARGUMENT

I. INTRODUCTORY STATEMENT

A. The Pennsylvania Association Of Colleges And Universities

The Pennsylvania Association of Colleges and Universities (PACU) was founded on October 6, 1896, as The Association of College Presidents of Pennsylvania. It continued to operate under that name until October 31, 1945 when its name was changed to Pennsylvania Association of Colleges and Universities. The Association was incorporated as a non-profit corporation on March 13, 1961. Its purpose, as stated in its constitution, is to consider and promote the welfare of education in the Commonwealth of Pennsylvania and in the Nation and to take counsel on matters of common interest.

Membership in PACU consists of non-profit colleges and universities in the Commonwealth of Pennsylvania which, by legal authority, offer associate, baccalaureate or higher degrees, and which are regionally accredited. At the present time, 98 colleges and universities throughout the Commonwealth are members out of a total of 104 such institutions in Pennsylvania (5 of which are theological seminaries). Thus, only one non-theological regionally-accredited institution in Pennsylvania is not a member of PACU. The latest figures reveal that member institutions represent a total faculty and administrative personnel population of approximately 75,000 persons and a total full time equivalent student population of more than 275,000.

PACU has as members such diverse institutions as state-owned, state-related and state-aided institutions, independent colleges, public community colleges and independent junior colleges, sectarian and professional institutions, as well as co-educational, women's and men's schools. PACU represents the whole spectrum of higher education in Pennsylvania.

PACU was formed to promote the welfare of higher education in Pennsylvania and, in this regard, has been called upon by the Governor, the Department of Education and the legislature and its committees to reflect upon and advise on matters involving higher education about which there is consensus among the colleges and universities. Because of its comprehensive make-up and expertise, the Association has provided a unique forum for matters pertinent to higher education and, thus, the fruits of its efforts have inured to higher education and to the people and youth of Pennsylvania.

In the legislative field, attempts are being made to update and improve the State College system, implement a master plan for higher education, strengthen and improve the scholarship and loan program and make grants and subsidies for higher educational facilities. In other areas, the Association has worked closely with the Pennsylvania Secretary of

Education, the Pennsylvania Department of Education, and the State Board of Education to develop and equalize educational opportunity goals throughout the Commonwealth's system of higher education. It has conducted surveys of student fees and other charges, and of financial aid to students, including scholarship, loan, and work-study programs both State and Federal, and has cooperated in effectuating a formula for a more equitable distribution of taxpayers' money.

PACU has engaged in these activities and will continue to do those things which, in its considered opinion, will promote the welfare of higher education in Pennsylvania.

B. Interest of Amicus Curiae

This brief is filed by PACU in support of Appellant, Middle States, because PACU and its constituent members firmly believe that the decision of the District Court is not only contrary to established legal principles but, if not reversed by the Circuit Court, will be contrary to the promotion of the welfare of education, not only in Pennsylvania but throughout the United States.

The constituent members of PACU are non-profit colleges and universities and have been accredited by Middle States. As members of Middle States, these institutions, together with Middle States, have as their goal the promotion of the effectiveness of educational institutions. Despite this laudable purpose, the District Court found that Middle States is a combination, contract and a conspiracy in restraint of trade. Every member of Middle States is a co-conspirator. The federation is also a conspiracy, and each regional member thereof a co-conspirator. Thus, each member of PACU is a co-conspirator and is therefore, extremely interested in the outcome of the present controversy.

Furthermore, the District Court found that Middle States is an arm of the Federal Government performing a function which the Federal Government would otherwise perform - accreditation. (Opin. ps. 37-38). And the District Court also found that Middle States is an arm of State Government. (FF. 61; Conclusion of Law 3). These findings and conclusions would admit and confirm action by State and Federal officials to further enter the field of higher education by investigating and accrediting institutions.

Finally, The District Court found that higher education, including accreditation of institutions of higher education, is trade and commerce and therefore subject to the Federal Antitrust Laws. (Opin. ps. 20, 23, 33 and 43). Higher education is, therefore, held by the District Court to be "trade or commerce" under the Antitrust Laws, accreditation an

"economic benefit" to all such institutions, and, therefore, by implication, all students, faculty members, academic credits, and academic courses "articles of commerce" within the meaning of the Antitrust Laws.

From the foregoing, it is quite evident that this decision has ramifications far beyond the accreditation or refusal to accredit a junior college in the District of Columbia. The couching of the decision in terms of "business", "profit" and "corporate activity" has consequences far beyond the Antitrust Laws even though no authority is cited for the proposition that the Antitrust Laws should regulate higher education. The decision reaches to the applicability of tax exemption statutes to institutions of higher education. It reaches to the labor field. As a matter of jurisdictional policy, the National Labor Relations Board has consistently refused to exercise jurisdiction over colleges and universities on the ground that they are "organizations not engaged in trade or commerce." *Trustees of Columbia University*, 29 L.R.R.N. 1098 (1951); *Crotty Bros., N.Y., Inc.*, 55 L.R.R.N. 1402 (1964). What is to become of these decisions?

For these reasons PACU submits that it has a real and present interest in the instant controversy and seeks to have the judgment of the trial court overruled and Appellee's Complaint dismissed in its entirety.

II. THE SHERMAN ACT IS NOT APPLICABLE

Fundamentally, the Sherman Act is concerned with the concentration of significant economic power in the hands of private individuals to a degree that such individuals have the power to control the economic terms of trade with a particular market. Sections 1 and 3 of the Sherman Act make it illegal to exercise coercive economic power to restrain or eliminate competition in a particular market.

The activities in which Appellant is engaged are *not* economic - they are *not* trade or commerce. Appellant is *not* a combination of capital formed for the purpose of increasing the return on capital. It is a cooperative self-improvement group formed by institutions with a common interest in raising educational standards. Its influence stems from educational factors, factors which are wholly outside the economic arena.

The Sherman Act is a wholly inappropriate instrument for regulating higher education. Violations of the act can be prosecuted as crimes. In civil actions, treble damages can be awarded. An injunction requiring radical changes in the manner a defendant operates can be granted. The Act seeks to assure that, within American industry, contending forces engendered by the desire for profit will operate freely.

The Sherman Act was never intended to regulate higher education. In industry, free competition for a commercial market, motivated by desire for profit, is deemed to be the soundest method for assuring maximum production. The forces which tend to produce the highest quality in education are entirely different from the forces which tend to produce the best automobiles or television sets. In education, the highest achievements have been obtained by the cooperative search for improvement, mutual assistance between institutions, and a continual dialogue between educators.

This system - the academic system - would be gravely threatened if every symposium could be characterized as a conspiracy and every self-improvement organization as a combination in restraint of trade.

Webster is unable to cite a single case in which the Sherman Act was invoked to regulate higher education. The theory of Webster's case is not supported by precedent or legal reason.

A. Congress Did Not Intend The Sherman Act To Regulate Higher Education

(1) The Supreme Court has confined the Sherman Act to commercial activity.

Because of the broadness of the language used in the operative sections of the Sherman Act, the Supreme Court has placed heavy dependence on the legislative history of the Act to determine Congressional intent. This is particularly so where the scope of the Act's application is in question, as in the instant case.

The Sherman Antitrust Law, enacted July 2, 1890, was designed to break up the large trusts and other combinations which were being formed in American industry during the period of rapid growth and prosperity following the Civil War. The Supreme Court in *Standard Oil Co. v. United States*, 221 U.S. 1, 50, 52 (1911), cites the Congressional debates to supply the background events which let to the enactment of antitrust laws and the evils which such laws were intended to suppress.

> "* * * The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: 1. The power which the monopoly gave to the one who enjoyed it *to fix the price* and thereby injure the public; 2. The power which it engendered of enabling *a limitation on production*; and, 3. The power of *deterioration in quality* of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale . . .", 221 U.S. at 52. (Emphasis added).

With regard to the background against which the Act was passed, the Supreme Court in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-493 (1940), stated:

> "* * * [The Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition *in business and commercial transactions* which tended *to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services*, all of which had come to be regarded as a special form of public injury." (Emphasis added).

In a footnote at this point, the *Apex* Court adds:

> "The history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that *'business competition'* was the problem *considered* and that the *act was designed to prevent restraint of trade which had a significant effect on such competition.*" 310 U.S. 493, Fn. 15 (Emphasis added).

The Supreme Court reaffirmed this holding of *Apex* in *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207; 213, fn. 7 (1959) when it stated:

> "The Court in Apex recognized that the Act is aimed primarily at combinations *having commercial objectives* and is applied only to a very limited extent to organizations, like labor unions, *which normally have other objectives.*" (Emphasis added).

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Supreme Court was faced with an alleged "combination" which did not have a commercial purpose. The plaintiffs alleged that the railroads had engaged a public relations firm and had waged a publicity campaign against the truckers. The purpose of the campaign was to create an atmosphere conducive to the adoption and retention of laws and law enforcement practices destructive to the trucking industry. The truckers alleged a conspiracy in violation of the Sherman Act and sought treble damages. Justice Black, speaking for the Court, rejected this contention on the ground that the combination complained of constituted political activity and was outside the reach of the antitrust laws. The Court stated that to accept the truckers' position

> " * * * would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." 365 U.S. at 137.

The Court continued:

> "The proscriptions of the Act, *tailored as they are for the business world*, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems

relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities of that nature impact and involve conduct that can be termed unethical." 365 U.S. at 141 (Emphasis added).

(2) The intent of Congress is clearly inconsistent with application of the Sherman Act to higher education.

The Court in *Noerr* gave consideration to countervailing congressional policies - congressional caution in legislating with respect to political conduct. An analogous caution has been demonstrated by Congress with regard to the regulation of educational standards, an area traditionally left to the states or voluntary associations. This policy of caution would be negated if the Sherman Act, through judicial fiat, is extended to the regulation of education. Thus, the National Defense Education Act, 20 U.S.C. Section 401 and Section 402, codified this national policy:

> "The Congress reaffirms the principle and declares that the states and local communities have and must retain control over and primary responsibility for public education . . . ." 20 U.S.C. 401.
>
> * * *
>
> "Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system. 20 U.S.C. 402.

Furthermore, Congress has sanctioned the cooperative combination of educational institutions for mutual benefit. In the "Higher Educational Amendments of 1968", amending the Higher Education Act of 1965, P.L. 89-329 20 U.S.C. 403 (Plaintiff's Exh. 123), Congress, in Section 1201(j), defined the term "combination of institutions of higher education" as:

> "* * * a group of institutions of higher education that have entered into a cooperative arrangement for the purpose of carrying out a common objective, or a public or private nonprofit agency, organization, or institution designated or created by a group of institutions of higher education for the purpose of carrying out a common objective on their behalf."

Thus, Congress has explicitly recognized the legitimacy and value of combinations in higher education. It would be strange indeed if Congress intended such combinations to constitute

violations of the Sherman Act, yet that is precisely what Webster contends and what the Court below held.

B. The District Court Erred In Its Holding That Higher Education Constitutes Trade Or Commerce.

Webster has sought to disown the Trial Court's holding that higher education is "trade or commerce" (Opposition to Motion for Stay, pp. 14-15) because it recognizes the novel and controversial nature of the Court's findings under Count 1. Webster cannot escape the clear language of the Opinion (p. 11):

> "A new and pivotal question here for determination is the applicability of the antitrust laws to the field of education. *Is higher education, including the accreditation of institutions, trade or commerce and thus within the regulatory scope of the Sherman Act?*"

The Court answers its inquiry in the following terms (p. 13):

> "The myriad financial considerations involved in building programs, teachers' salaries, tuitions and miscellaneous operating expenses attest to the commercialization which necessarily exists in the field of higher education. Despite the opposition of many educators, there has been a recent trend toward the organization of faculty members to bargain collectively for better salaries and other benefits. Many institutions rent dormitory rooms and operate dining halls, book stores and other service facilities. Also there is a commercial aspect to the sharp competition for government and private contracts and the quest for research grants. In 1967-68 institutions of higher education expended more than 17 billion dollars. The projection for the year 1976-77 is 41 billion. Higher education in America today possesses many of the attributes of business. To hold otherwise would ignore the obvious and challenge reality."

This holding is highly controversial, at the very least. The Trial Court focuses on certain peripheral aspects of higher education and concludes from them that the overall nature of this highly complex and ancient activity is "trade or commerce." Here, unlike *United States v. American Medical Association*, 110 F. 2d 703 (D.C. Cir. 1940), and 130 F. 2d 223 (D.C. Cir. 1942), discussed below, *not a shred of common law precedent supports this conclusion.* And it was specific common law precedent that was dispositive of the *AMA* litigation and other Sherman Act cases. *Legally, factually and philosophically the holding is unsound.*

Webster would have the Court believe that the decision of the Trial Court rests on the finding that *Webster* is engaged in trade or commerce. The Court does describe Webster's activities. However, this examination is plainly subsidiary to the holding that higher education -- including accreditation of institutions -- constitutes "trade or commerce."

Further, the Trial Court's reasoning on this subsidiary inquiry is open to question. The Court states that Middle States can hardly deny that Webster is engaged in trade since Webster's "proprietary character is the reason for the membership exclusion and the *sine qua non* of this proceeding." (Opinion p. 14).

The Court thus implies that Webster is engaged in "trade or commerce" simply because Webster operates for profit. In *AMA* the Supreme Court clearly rejected the argument that, because Group Health was nonprofit, it could not be engaged in "trade or commerce." The Supreme Court made clear that, in determining whether an entity is engaged in trade or commerce, attention is not focused on the corporate form, but rather on the activity engaged in. *American Medical Association v. United States,* 317 U.S. 519, 528 (1943). Webster is licensed as a junior college. The inquiry is whether higher education – the activity engaged in by Webster – is "trade or commerce."

The Supreme Court in *American Medical Association v. United States,* held that the character of GHA's corporate charter did not determine the issue of whether or not GHA was engaged in business or trade:

> "The fact that it is cooperative and procures services and facilities on behalf of its members only, does not remove its activities from the sphere of business." 317 U.S. at 528.

In each of these cases, the Courts examined *the nature of the activity* carried on and, on this basis, determined whether the party was in trade. The Courts did not look at *the charter of the corporation* to see whether or not it was incorporated for profit.

The corporate nature of a particular entity is not determinative as to whether it can invoke the Sherman Act. The determinative test is the nature of the activity it is engaged in - whether that activity is trade or commerce or whether it is not. If application were dependent on the nature of the corporation, one profit making corporation in any field could bring that field within the scope of the act: one profit-making *church* could subject the entire field of *religion* to the Sherman Act, just as under the District Court's decision, one profit-making junior college subjects the field of higher education to the Sherman Act. Further, the test advocated by Webster gives profit-making entities a privileged position in any field they enter - *they, but not their non-profit neighbors, can invoke the Sherman Act.*

(1) The controlling definition of "trade" excludes higher education.

In *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427 (1932), the issue was whether cleaning, dyeing, and otherwise renovating clothes constituted trade or commerce

within the meaning of Section 3 of the Sherman Act. The Court affirmed the Supreme Court of the District of Columbia, and held that these activities did constitute trade or commerce within the meaning of Section 3. With regard to the meaning of the word "trade," the Court relied on the decision of Justice Story in *The Nymph* (C.C.) 1 Sumn., 516, 18, Fed. Cas. 506 (No. 10388 1834). Justice Story, in construing use of the term "trade" in the Coasting and Fishery Act of 1793, made the following statement which was quoted by the Court in *Atlantic Cleaners & Dyers:*

> "Whenever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, *not in the liberal arts or in the learned professions*, it is constantly called a trade." 286 U.S. at 436 (Emphasis added).

In excluding the liberal arts from the definition of trade, the Supreme Court precludes application of the Sherman Act in the instant case.

In 1950 the Supreme Court again applied the *Nymph* standard in *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950). The sole inquiry was whether the business of a real estate broker was "trade" within the meaning of Section 3 of the Sherman Act. Justice Douglas, on behalf of the Court, stated that (1) the activity was "commercial", and (2) that it was carried on for a profit. The Court stated:

> "Their activity is commercial and carried on for profit.... *The competitive standards which the Act sought to preserve in the field of trade and commerce seem as relevant to the brokerage business as to other branches of commercial activity.*" 339 U.S. at 492 (Emphasis added).

The Court applied the *Nymph* standard and concluded that the business of a real estate broker constituted "trade" within the meaning of Section 3.

As applied to the instant case, the holdings of *Atlantic Cleaners* and *National Association of Real Estate Boards* are clear. The *Nymph* formula definitely precludes application of the antitrust laws to the profession or the liberal arts. Further, a fundamental three-tier test is set up by *National Association of Real Estate Boards* - (1) whether the activity is commercial, (2) whether it is carried on for a profit, and (3) whether the competitive standards embodied in the Sherman Act are relevant to the activity in question.

(2) The Carrying On Of Higher Education Is Not A Commercial Activity.

National Association of Real Estate Boards, supra, requires that an "activity" be commercial before the antitrust laws can be applied to regulate that activity.

That higher education is not a commercial activity is universally recognized. Education is a public service and higher educational institutions are maintained, not for profit, but for the public. As the Court said in *Chicago Business College v. Payne*, 20 App. D.C. 606 (1902):

> "The lower education, when it is not given by the State, or through some public agency, or by some religious organization as a matter of benevolence, is usually left to individuals to be conducted as a business; while instruction in the higher branches of human knowledge is generally disseminated through those institutions of learning, popularly known as such, which owe their origin to private or public munificence and are *established solely for the public good and not for private gain.*" 20 App. D.C. at 613 (Emphasis added).

These cases are in fundamental accord with the exclusion of the "liberal arts" from trade by the Johnson definition embodied in the *Nymph* test.

C. The Competitive Standards Embodied In The Sherman Act Are Irrelevant To Higher Education.

The Court in *National Association of Real Estate Boards*, supra, specifically found that the competitive standards of the Sherman Act were relevant to the business of real estate brokers. Such a finding could not be made in the instant case.

Since the early days of the Sherman Act, the Supreme Court has recognized that the end sought to be achieved by the statute was effective competition by economic units. In *FTC v. Raladam Co.*, 283 U.S. 643 (1931), the Court approved an earlier statement in *FTC v. Sinclair Refining Co.*, 261 U.S. 463, 476 (1922) which said:

> "The great purpose of both statutes [the Sherman Act and the Federal Trade Commission Act] was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."

And the Court squarely held that the protection afforded by both statutes

> "... presupposes the existence of some substantial competition to be affected."

283 U.S. at 648. See also *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("... the policy unequivocally laid down by the [Sherman] Act is competition.").

Given this goal of rivalry between contending economic units sought to be attained by the antitrust laws, *it is clear that the entire regulatory scheme is wholly foreign to higher education.* This is so because the relationship between colleges is cooperative, not

competitive. Higher education is permeated by programs for exchanges of professors, permitting students to take courses for credit at other institutions, and generally involving pooling of resources. Such cooperative endeavors are not a hallmark of business competition, and thus to apply the Sherman Act to higher education is to engraft foreign concepts onto a system to which it is ill suited. The teaching of *Sinclair Refining* is clear: The Sherman Act's purpose is to *preserve* the competitive relationship between business entities. The Act is not intended to *impose* competition as the relationship among institutions which have never before had competition among them.

D. The Reach Of The Sherman Act Is Consonant With The Reach Of The Restraint Of Trade Doctrine At Common Law.

(1) The Sherman Act was intended to codify the common law on restraint of trade.

The legislative history of the statute established a fundamental proposition: the Sherman Act was intended to provide, on a national basis, a remedy dealt with on a state-wide basis by the common law. The Act codified the principles of the common law with regard to restraint of trade. Whether a particular activity is within the scope of the Sherman Act must be determined by whether or not common law restraint of trade concepts were applied to the activity.

Thus, Senator Sherman, in describing the bill, stated:

> "It [the bill] does not announce a new principle of law, but applies old and *well recognized principles of the common law* to the complicated jurisdiction of our State and Federal Government. Similar contracts in any State in the Union are now by common law or statute law, null and void. Each state can and does prevent and control combinations within the limit of the state." 21 Cong. Rec. 2456, cited in 1 *Toulmin* at 7 (Emphasis added).

Senator Sherman, in debates, discussed in detail certain state court common law restraint of trade cases, the deciding principle of which the Senator sought to have enacted into national law. Cf. *Apex Hosiery Co. v. Leader, supra,* 310 U.S. at 497, fn. 17.

Senator Sherman cited *Richardson v. Buhl,* 77 Mich. 632, 43 N.W. 1102 (1889), a leading case decided by the Supreme Court of Michigan. The Court there held that a contract to enforce a monopoly in the manufacture of matches was illegal as a restraint of trade. The Diamond Match Co., according to the Court, was organized for the purpose of aggregating

> "* * * an enormous amount of capital, sufficient to buy up and absorb all of that kind of business done in the United States and Canada, and to prevent any other person or corporation from engaging in or carrying on the same, thereby preventing all competition in the sale of the articles manufactured. *The sole object of the corporation is to make money by having it in its power to raise the price of the article or diminish the quality to be made and used at its pleasure.*" 43 N.W. at 1110. (Emphasis added).

Senator Sherman placed emphasis upon *People v. North River Sugar Refining Company*. 3 N.Y. Supp. 401 (Cir. Ct. N.Y. County 1889), *aff'd*. 7 N.Y. S. 406 (Sup. Ct. 1889). This was the leading case in which the common law was used as a basis for declaring a trust illegal. Senator Sherman cited the opinion of Justice Barrett, 3 N.Y.S. 401, which reviewed the common law on the subject.

> "But all the cases, ancient and modern, agree that a combination, *the tendency of which is to prevent general competition and to control prices*, is detrimental to the public, and consequently unlawful . . . . Judge Daly sums up the result of his examination of the cases in these words: 'That combinations are unlawful, the design and effect of which necessarily is to give the party combining a monopoly, more or less, for any length of time, of the manufacturer or sale of a commodity, * * * or to regulate and control the price of a commodity, * * * or to secure any pecuniary advantage in restraint of trade which would be injurious to the community.' " 3 N.Y. Supp. at 409 (Emphasis added).

Justice Barrett cites six cases on this point, all of them involving a traditionally commercial activity and a restraint or monopoly entered into for the purpose of pecuniary gain. Not one applies the common law doctrine against monopolies or restraints of trade to activities that are not commercially or profit oriented. The same is true of other cases discussed by Senator Sherman.

(2) The common law test was the standard on which the AMA case was decided by this Circuit.

The opinion of this Court of Appeals in *United States v. American Medical Ass'n.*, 110 F. 2d 703 (D.C. Cir. 1940), cert. denied, 310 U.S. 644 (1940) and 130 F. 2d 223 (D.C. Cir. 1942), 317 U.S. 519 (1943) rests on the applicability of restraint of trade concepts to the practice of medicine. Thus Justice Miller, in the second Court of Appeals decision sustaining the conviction of the defendants, stated:

> "It may be regrettable, that Congress chose to take over in the Sherman Act the common law concept of trade, at least to the extent of including therein the practice of medicine. Developments which have taken place during recent decades in the building up of standards of professional education and

licensure, together with self imposed standards of discipline and professional ethics, have, in the belief of many persons, resulted in substantial difference between professional practices and the generally accepted methods of trade and business." (130 F. 2d at 238.

E. Neither Common Law Restraint Of Trade Concepts Nor The Sherman Act Have Ever Been Applied To Higher Education.

Research with respect to both American and English restraint of trade precedents does not produce any case applying the restraint of trade concept to higher education. We are *unable* to find a *single* case, either English or American, where restraint of trade concepts were successfully applied to an institution of higher education, or to an association of institutions of higher education. Webster, in its extensive briefs, has never cited such a case. The total absence of such cases is highly significant, and should suffice to preclude application of the Sherman Act in the instant case.

Furthermore, research has revealed not one case where the Sherman Act has been applied to higher education. Nor has research revealed a single case where an institution engaged in higher education successfully invoked the Sherman Act. Webster has never cited such a case. There is absolutely no precedent for the relief Webster seeks.

F. The District Court's Dependence On The AMA Decision Was Erroneous.

Besides the existence of common law cases which applied restraint of trade concepts to the practice of medicine, the *AMA* Court had before it a combination which was clearly motivated by the desire to protect the economic position of the individual practitioner.

In 1937, the A.M.A., the District Society, and certain individuals entered into a ruthless and concerted course of conduct to destroy Group Health Association, a prepaid, risk sharing, medical program. Any member of the District Society who either joined GHA's staff or consulted with physicians on its staff was threatened with disciplinary action. In fact, several members were either forced to resign or were expelled from the Society. Steps were taken to obstruct the doctors on GHA's staff from treating and operating upon patients in Washington hospitals. A "white list" of approved organizations, groups and individuals, with the name of GHA omitted, was curculated. Members were threatened with disciplinary action if they dealt with anyone who was not on the list.

The A.M.A., the District Society, and various other defendants were indicted for a conspiracy in restraint of trade in the District of Columbia, in violation of Section 3 of the Sherman Act. In describing the charge, Chief Justice Groner said:

"The conspiracy is charged to have had as its background the long continued policy of opposition on the part of American Medical Association to risk-sharing plans for medical service, *growing out of the fear of its members of business competition from doctors connected with such organizations*." 110 F. 2d at 707. (Emphasis added).

The Report of the Attorney General's National Committee to Study the Antitrust Laws confirms both the common law test and the necessity of a commercial orientation of the combination to bring it within the scope of the Sherman Act. The *Report* at 63, n. 232, states - with reference to the *A.M.A.* case:

"Since *at common law* contracts in unreasonable restraint of the physician's right to practice his profession were often held to be unenforceable, the *business aspects* of the learned professions fall within the limits of the Sherman Act, both in the District of Columbia and federal territories, if they fall within the jurisdictional reach of the 'trade or commerce' clauses of the Act." (Emphasis added).

The dangers inherent in an open-ended application of the Sherman Act to the professional - as distinguished from the businesslike - aspect of medical practice were pointed up by commentators at the time.

The instant case is not concerned with the "businesslike aspects" of higher education. The eligibility criteria, the validity of which is in question, did not spring from economic considerations; it sprang from purely educational considerations, both philosophical and practical. Webster has never even attempted to show that the nonprofit criteria grows out of economic or businesslike considerations. Absent such a showing, the traditional exclusion of higher education from trade retains its full integrity, and the *AMA* cases are not applicable.

III. NO COMBINATION OR CONSPIRACY IN RESTRAINT OF TRADE EXISTS

The District Court opinion manifests a unique approach to proof of conspiracy or combination. If it stands, future plaintiffs suing under the Sherman Act will in effect be relieved of proving a combination - all they will need to show will be the existence of an organizational structure - no matter what the nature of the organization.

The District Court's opinion dismisses the combination requirement of the Act in three sentences:

"Plaintiff does not contend that the members of Middle States conspired specifically to restrain its trade nor that the six regional associations formed the Federation for that purpose. The evidence negates the existence of any evil, purposeful plotting by the defendant and Webster concedes that the reason for combining was honorable and laudable. However, it is clearly apparent that the intent to combine was present in each case and that the two associations, by

their very formation, represent combinations and did enter into contracts." Opinion, p. 25.

The District Court's holding that the very formation of an association represents a combination is unsound. *Not one case is cited in support of the proposition. It flies squarely in the face of precedent.* If upheld, it would give rise to wholesale liability.

The failure of the District Court with regard to combination is fundamental. The Court did not even define, much less analyze, the relevant market. Even liberally defined, the relevant market in this case could not be more than higher education in the District of Columbia. Yet, the Court made no finding that Middle States possessed or exercised coercive economic power of sufficient magnitude over this field to be able to restrain the ability of Webster to compete.

Plaintiff wholly failed to prove a combination in restraint of trade. The flourishing condition of Webster negates that it was in fact restrained. The nature and activities of Middle States negate the fact or possibility that it possessed the ability to restrain Webster's trade.

Middle States has *not* fixed the price of higher education in the District of Columbia. Middle States has *not* controlled the amount of higher education available in the District. Middle States has *not* attempted to lower the quality of higher education in the District so that an educational "trust" or monopoly could realize higher profits. Middle States has worked *no* group boycott against Webster to prevent them from participating in higher education in the District. The fact that they have so participated and dramatically increased the size of their student body in the last ten years completely negates this possibility.

A. The District Court Erred In Holding That Mere Organization As An Association Is Sufficient To Prove Conspiracy Or Combination Under The Sherman Act.

Mere organization simply does *not* constitute a combination in and of itself. Because Middle States is a membership organization of numerous colleges and universities, this proposition is most easily illustrated by reference to the group boycott cases.

Two evidentiary steps are necessary to show the existence of a group boycott: (1) the decision to exclude a particular entity from membership or approval, and (2) the use of coercive power to keep the nonmember from engaging in the relevant activity. Cf. *United States v. Insurance Board of Cleveland*, 144 F. Supp. 684, 698 (D.C. Ohio 1956).

There is no question that MSA has withheld membership and approval from Majorie Webster Junior College. The issue, in the context of conspiracy or combination, is whether

it subsequently exercised a coercive power based on a monopoly position to preclude Marjorie Webster from carrying on its activities, thus removing it as a "competitive" threat to its members.

Two cases illustrate the nature of this second evidentiary requirement. In *Radiant Burners, Inc. v. People's Gas Light and Coke Co.*, 364 U.S. 356 (1961) the plaintiff Radiant Burners, a manufacturer of heating units, alleged that the American Gas Association, Inc. ("AGA"), a membership corporation, had violated Section 1 of the Sherman Act. Radiant Burners alleged that the AGA had adopted a "seal of approval" which it affixed to such gas burners as it determined had passed its test. This seal was denied to plaintiff's burners.

AGA included in its membership, utility companies which provided gas in the areas where plaintiff wished to sell its burners. AGA enforced its "seal of approval" through the refusal of its utility company members to provide gas for use in nonapproved gas burners. Thus, through the use of its power, AGA effectively excluded plaintiff's nonapproved gas burners from the market, as plaintiff's potential customers would not be able to obtain gas for any burner purchased from plaintiff.

Thus in *Radiant Burners*, the two step burden set out above is clearly illustrated: (1) AGA decided not to give Radiant Burners the "seal of approval" (2) it absolutely foreclosed Radiant Burners from the market by excluding it from the supply of gas.

To fall within the rule of the Radiant Burners case, MSA would have had not only to withhold approval to MWJC, *but also to have cut off the supply of students going to the Plaintiff.*

The same principle is implicit in *Fashion Originators' Guild of America v. F.T.C.*, 312 U.S. 457 (1941). Fashion Originators' Guild of America was an organization of enterprises engaged in the design, manufacture, sale and distribution of women's garments, and also the manufacturers of textiles. The member garment manufacturers claimed to be creators of original designs of fashionable clothes for women. The member textile manufacturers claim to be creators of original fabric designs.

After these designs entered the channels of trade, other manufacturers systematically made and sold copies of them - the copies selling at lower prices than the originals. The originator manufacturers referred to this as style piracy, and through the Guild they combined themselves for the admitted purpose of destroying all competition from the sale of garments copied by other manufacturers from designs put out by Guild members. The

Guild took two steps: (1) It pressured 12,000 retailers throughout the country to sign agreements promising to "cooperate" with the Guild. (This step may be viewed as analogous to membership or seal of approval). (2) The Guild then set up a system of cards - red cards for noncooperating retailers, and white cards to cooperating retailers, and distributed these cards to member manufacturers. The member manufacturers refused to sell any products to noncooperating retailers, thus gravely threatening the ability of noncooperating retailers to compete with cooperating retailers.

The Supreme Court held that the arrangement constituted a group boycott violative of Sherman and Clayton Acts.

Again, as in Radiant Burners, the combination had exercised its coercive power to exclude the outsider from participating in the relevant activity. It is the exercise of this coercive power to enforce uniform patterns of conduct on the part of the combination members, the effect of which is to preclude or gravely hinder the outsider's competitive abilities, which is the essence of group boycott.

Such an exercise of power is not present in this case. Webster has demonstrated only the existence of a membership criterion which excludes profit making institutions. It has not shown (1) that MSA has the coercive power to enforce a particular pattern of conduct on its members, or (2) that MSA has exercised that power to preclude the plaintiff from carrying on the activity it is engaged in.

The relevant point of pressure would be on the secondary schools who send students to Marjorie Webster. Webster has not shown that member secondary schools who send students to Marjorie Webster have suffered any sanction whatsoever from the Middle States Association. The evidence demonstrated that member secondary schools did send their students to Marjorie Webster.

Even if the alleged boycott is generalized, no showing of the exercise of coercive power has been shown. Plaintiff has totally failed to show that MSA sends any directives or instructions to its secondary school members directing them not to send high school graduates to unaccredited institutions in general.

What evidence there is in the record negates the existence of the exercise of coercive power to hamper the Plaintiff in carrying on its chosen activity.

B. The District Court Erred In Finding A Combination Or Conspiracy In The Random Behavior Of Isolated Members Of Middle States.

The District Court placed reliance on the fact that some colleges and universities will not accept transfer credits from an unaccredited institution. The theory on which this

matter is cited is not clear. The pattern with regard to acceptance or rejection of credits from unaccredited institutions is totally random. Most MSA member institutions of higher education do accept transfers from unaccredited institutions, although some impose special conditions. There is no proof that most Middle States members don't accept Webster's credits. With regard to Middle States members, *Webster was only able to show that 11 such institutions refused to accept their credits out of a total of 346 colleges or universities which are members of Middle States.* Webster claims that over 200 institutions accept their credits. Many of these must be in the Middle States area.

There is no showing of parallelism - much less conscious parallelism - with regard to acceptance or rejection of transfer credits. The Trial Court made no finding that Middle States exercised coercive power on member institutions to reject credits from unaccredited institutions, or indeed, that Middle States had any policy whatsoever on this matter.

Webster attempts to render illegal the behavior of some MSA member institutions which, on the basis of their own decision, reject Webster transfer credits. Webster seeks to make such eccentric behavior itself constitute a Sherman Act violation on the part of an organization to whom these isolated institutions belong. The Supreme Court has rejected this approach. In *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), *a case where proof of parallel action was established,* the Supreme Court stated:

> "The crucial question is whether respondents' [members of the alleged conspiracy] conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express . . . . [T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, *that such behavior itself constitutes a Sherman Act offense.* Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy *but 'conscious parallelism' has not read conspiracy out of the Sherman Act entirely.*" 346 U.S. at 540-41 (emphasis added).

The challenged behavior in this case - the refusal of 11 institutions which are members of Middle States to accept Webster's credits - constitutes, if anything, "unconscious nonparallelism."

This Court has closely followed the *Theatre Enterprises* rule. In *Orbo Theatre Corp. v. Loew's, Inc.*, 261 F. 2d 380, (D.C. Cir. 1958), *cert. denied*, 359 U.S. 943 (1959), this Court affirmed *per curiam* a District Court opinion in which parallel business behavior alone had been deemed insufficient to establish the conspiracy element of a Sherman Act violation.

Plaintiff, a theatre operator in Maryland, contended that Defendants, who were movie producers and distributors in Washington, violated Section 3 by their practice of withholding release of new movies to it for a 21-day clearance period during which time the pictures were shown exclusively at Defendants' theaters in the District. There, as here,

plaintiff sought to blow up instances of random behavior into a sinister pattern of intentional, concerted action against it. Judge Holtzoff's opinion in the District Court (156 F. Supp. 770), however, held for defendants:

> "The fact that parallel action was taken by alleged conspirators may under certain curcumstances justify the court in drawing the conclusion that the parallel action was concerted action. Such an inference is permissible, but is not compelled. Whether to reach it in any particular case depends on the remainder of the evidence and the surrounding circumstances. Parallel action may indeed by concerted action, but it may also be due to the fact that persons concerned arrived at the same simple solution of a common business problem. Here the problem was a comparatively simple one, and the solution reached was more or less obvious. If the various officers and employees involved in the decision refrained from testifying on this point, the court might well draw an adverse inference. On the other hand, considering the fact that there was absolutely no evidence of the alleged conspiracy, beyond the taking of parallel action; that each of the participants denied any communication or consultation with any of the co-defendants; and that none of the witnesses was in any way impeached or gave any testimony that was in any way inherently incredible, . . . were jointly planned or concerted. In fact, the Court cannot do so without reaching the conclusion that some of the witnesses testified falsely. . . . The Court, therefore, concludes that the plaintiff did not establish by a preponderance of the evidence that there had been a conspiracy on the part of the defendants to exercise an undue or illegal restraint against the operations of the Villa Theater."

156 F. Supp. at 775-6. Judge Holtzoff was affirmed on this and every other point by this Court. 261 F. 2d 380.

Judge Holtzoff's holding would be just as apt in the instant case. The only cognizable harm that might be deemed to accrue to plaintiff by virtue of its lack of accreditation is the difficulty it alleges its students suffer when seeking to transfer to other colleges. Like the plaintiff in *Orbo* in dealing with random behavior, plaintiff here paraded before the District Court several instances in which Webster students were told that their credits would not be acceptable because Webster is unaccredited. However, representatives of the institutions concerned testified that their individual admissions policies were theirs and theirs alone, and not dictated by Middle States. Moreover, the number of institutions at which Webster students experienced this difficulty is only a fraction of the Middle States membership. Finally, here, too, "there was absolutely no evidence of the alleged conspiracy", and the District Court made no such finding. Plaintiff, in short, came nowhere near to meeting its burden of showing by a preponderance of the evidence that there was any conspiracy or even concerted action by defendant or its members to restrain plaintiff's "trade".

See also *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F. 2d 199 (3rd Cir. 1961), *cert. denied*, 369 U.S. 839 (1962)(uniformity of action found, but held

"not enough to sustain a finding of conspiracy", which "remains an essential ingredient of a case based on Section 1."); and *Independent Iron Works v. U.S. Steel Corp.*, 322 F. 2d 656, 661 (9th Cir. 1963), *cert. denied*, 375 U.S. 923 (1963).

C. A Finding Of Conspiracy Or Combination Cannot Be Premised On The Mere Circulation Of A List By An Association.

Webster attempts to render circulation of a list by an organization instant proof of conspiracy. Webster places total dependence for this argument on *Eastern States Lumber Association v. United States*, 234 U.S. 600, 612-614 (1914). A reading of that case demonstrates its lack of applicability to the case at bar.

An association of retail lumber dealers circulated a list of wholesale lumber dealers who sold directly to retail consumers. This list was confidential and sent only to member dealers. The Supreme Court's holding was based on the obvious intent of the Association to work a boycott on wholesalers dealing directly with retail consumers, while by - passing the member retailers. The Court stated:

> "When viewed in the light of the history of these associations and the conflict in which they were engaged to keep the retail trade to themselves and to prevent wholesalers from interfering with what they regarded as their rights in such trade, there can be but one purpose in giving the information in this form to the members of the retail associations of the names of all wholesalers who, by their attempt to invade the exclusive territory of the retailers, as they regard it, have been guilty of unfair competitive trade. These lists were quite commonly spoken of as blacklists, and when the attention of a retailer was brought to the name of a wholesaler who had acted in this wise it was with the evident purpose that he should know such conduct and act accordingly. True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do; but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own." 234 U.S. at 608-609.

The District Court specifically stated that Middle States did not intend to restrain Webster's trade. Absent either intent or use of coercive power to enforce a particular pattern of conduct on its members with regard to nonlisted institutions, *Eastern States* has no applicability.

D. Webster's "Trade" Has Not Been Restrained.

Assuming *arguendo* that Webster is in "trade", that "trade" has not been restrained by Middle States. In the District Court, Webster made much of the fact that since 1967, it has suffered a decline in its number of applicants. It sought to lay this decline at MSA's doorstep as the alleged result of MSA's refusal to accredit. The District Court refused to go that far, but it did make a Finding of Fact as to the number of applications received for the class years 1964-70. (F.F. 52). The Court also found that "the number of applicants denied admission by Webster steadily increased from approximately 200 in 1963-64, which number of rejections has continued through 1965-66." Finding No. 53.

Figure 1 in the Statement of Facts, *supra*, precludes any inference that the decline in applications received has been caused by Middle States. Figure 1 shows that all five women's colleges in the District, including Webster, has suffered a drop-off in applications received, beginning in class year 1966. All the other colleges, save Webster, are Middle States members. At the trial, Appellant introduced unrebutted evidence as to the causes of this decline: the peak of the post war baby boom; increasing preference for co-educational institutions, the highly publicized crime situation in the District, etc. Clearly, if the same "harm" that accrues to Webster also accrues to the Middle States members in the District, the cause lies elsewhere than in the refusal to accredit.

And the fact that Webster has rejected a greater and greater number of applicants, year after year during the operation of the alleged "conspiracy" hardly constitutes proof that it has suffered irreparable harm from its non-accredited status.

A final fact militating against the District Court's conclusion is the spectacular increase in Webster's profits during the years 1961-67. The Schedule of Webster's financial posture introduced at the trial by Defendant (MSA X 525A) shows that Total College Income had increased 82.3% by July 31, 1967 over what it was in the year ended August 31, 1961. More revealingly, while Total College and Total Administrative Expense rose 55% and 90% respectively, Webster's Net Operating Income tripled during the same period.

The District Court made no findings as to Webster's financial condition. Indeed, the robust figure that Webster cuts on the balance sheet is hardly compatible with the image of the victim of a conspiracy suffering irreparable harm. In addition, the lack of any demonstrable monetary damage brings Webster within the rule of cases holding that a private antitrust plaintiff must prove *the fact of damage* as a prerequisite to maintaining the cause of action.

CONCLUSION

The judgment of the trial court should be overruled and appellee's complaint should be dismissed in its entirety.

Respectfully submitted,

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October 21, 1969

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23351

MARJORIE WEBSTER JUNIOR COLLEGE, INC.,

Plaintiff-Appellee,

vs.

MIDDLE STATES ASSOCIATION OF COLLEGES
and SECONDARY SCHOOLS, INC.,

Defendant-Appellant.

BRIEF OF PACE COLLEGE,
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARJORIE WEBSTER JUNIOR COLLEGE, INC., Plaintiff-Appellee vs. MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC., Defendant-Appellant	NO. 23351

BRIEF OF PACE COLLEGE

as Amicus Curiae

This brief is intended to demonstrate that the State of New York by its legislation and the decisions of its courts (in at least one of which, a "leading" case, Pace College was a litigant) has distinguished between educational institutions operated exclusively for educational or other non-profit purposes and those which are not; and thus the similar distinction made by appellant Association has respectable precedent.

The statute is section 420 of the Real Property Tax Law (formerly section 4, subd. 6 of the Tax Law) reading, in part:

> "§ 420. Non-profit organizations
>
> "1. Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for * * *

educational, * * * purposes, * * * and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section. Such real property shall not be exempt if any officer, member or employee of the owning corporation or association shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purposes be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees; or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

"2. If any portion of such real property is not so used exclusively to carry out thereupon one or more of such purposes but is leased or otherwise used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be exempt; * * *."

The statute was applied and interpreted in

Matter of Pace College v. Boyland,
4 N Y 2d 528,

the facts of which were that this college, organized exclusively for educational purposes, made an arrangement with Horn & Hardart ("Automat") to run the cafeteria in the college premises at the business risk of Horn & Hardart, i.e., take any loss or retain any profit simply because the college was unable to operate the lunch-room itself. The Tax Commission, the trial court (11 Misc 2d 387) and the Appellate Division (4 A D 2d 855) held that the lunch-room portion of the premises lost the tax

exemption because it was being used for profit making purposes. The Court of Appeals reversed, holding that the furnishing of meals was an "educational purpose" and within the meaning and intent of the Tax Law the property did not lose its exemption because the particular method used did not diminish the essential fact that the college was operating the cafeteria. This was "not renting space to some disassociated enterprise," for example, a book shop or sporting goods retailer.

On the other hand, a "private" school whose owner was "lawfully entitled to receive any pecuniary profit that may be earned" was not given exemption even though actually there were no profits and only losses.

> Matter of Semple School for Girls v. Boyland, 308 N. Y. 382.

A finer and more subtle distinction further separating educational institutions even "public," was made in another Pace College case.

> Matter of Board of Education v. Pace College, 27 A D 2d 87; (leave to appeal to Court of Appeals granted, 27 A D 2d 708, but settled before argument in Court of Appeals).

There, the college resisted condemnation proceedings by the local, public school district to acquire 50 acres of the college's campus for a public school site. The college's defense

was that the 50 acres was "already devoted to a public use." Special Term of the Supreme Court held in favor of the college, but the Appellate Division reversed on the ground that "the defense of a prior public use is available only to a property owner who has been granted power to condemn equivalent to that of the petitioning condemnor, and that, since Pace has been granted no such power, it may not resist appropriation of the subject parcel by plaintiff, which has (Education Law, § 404, subd. 2)."

Hence, it is no new thing but now settled law that distinctions can be made between schools that are devoted entirely to education without any profit incentive and those which permit profits to be made though the likelihood of profit is remote, and to award subsidies in the form of tax exemption to the first group; and between institutions that are "very public" in the sense that they have been granted the power of eminent domain (e.g., University of Southern California v. Robbins, 1 Cal. App. 2d 523, 37 P. 2d 163, cert. den., 295 U. S. 738) and those who have to negotiate the purchase of property, and to award the subsidy in the form of protection against taking away by another public body of the property it has and needs for its school plant.

Parenthetically, and in reference to the case of Cornell University v. Messing Bakeries, Inc., 285 App. Div. 490, affd., no opinion, 309 N. Y. 722 (in which the undersigned was also counsel), cited in the footnote to p. 57 of Appellant's (draft) brief on this appeal, Cornell partly predicated its complaint on the theory that there was actual competition between it and the defendant because "the current expenses of the colleges of agriculture and home economics are and have been defrayed, in part, by receipts from the sale of food products marketed and sold under the plaintiff's name" (Record on Appeal, p. 5, fol. 13), which, in its bill of particulars it amplified by stating were "the following food products under its name: Milk, buttermilk, etc., marketed and sold * * under its name since in or about the year 1902 * * in various cities, towns and villages in the State of New York and elsewhere * * at wholesale and retail * *." (same Record, pp. 11-12, fols. 33-5). The trial court found (same Record, p. 15, fols. 44-5) that "the plaintiff realizes, incident to its educational and research programs in the fields of agriculture and home economics, approximately $1,000,000 annually from receipts from the sale of products; and one-half of this amount is realized from receipts from the sale of food products under the plaintiff's name." Thus, Justice (now Judge of the New York Court of Appeals) Bergan's language in the opinion (285 App. Div. at 492) that it "was not necessary to jurisdiction or to relief that plaintiff be

in another business in the same line" and "the ground for equitable intervention is not merely 'unfair competition' in the limited sense of protecting the solidly acquired business rights of one business enterprise against another striving for the same market," takes on added significance because the issue found by the trial court and serving as a foundation for its judgment, was lively contested.

It is respectfully urged that the judgment of the District Court should be reversed and the complaint dismissed.

October 22, 1969.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23351

MIDDLE STATES ASSOCIATION OF
COLLEGES AND SECONDARY SCHOOLS, INC.

Appellant

vs.

MARJORIE WEBSTER JUNIOR COLLEGE, INC.

Appellee

On Appeal from the United States District
Court for the District of Columbia

BRIEF OF

WESTERN ASSOCIATION OF SCHOOLS AND COLLEGES

AS AMICUS CURIAE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Is higher education, including the accreditation of institutions, trade or commerce and thus within the regulatory scope of the Sherman Act?

(2) Is a purely private "combination of institutions of higher education" as defined in the Higher Education Act of 1965 PL 89-329 entitled to favored treatment, or should the restrictions of the Sherman Act apply to its activities?

(3) Is such a purely private "combination of institutions of higher education" which does not purport to act as an arm or agent of Congress or of the District of Columbia subject to the Constitutional restraints of due process?

(4) Is plaintiff Marjorie Webster Junior College, Inc., which is already accredited by the District of Columbia Board of Education, entitled to compel defendant Middle States Association of Colleges and Secondary Schools, Inc., to consider its application for regional accreditation?

STATEMENT OF THE CASE

Plaintiff-Appellee Marjorie Webster Junior College, Inc., is a business corporation of the District of Columbia, owned and controlled by the members of one family, who hold most of the administrative and corporate offices in the corporation and institution and who are its sole stockholders. It is organized for profit. It has successfully operated from 1947 to the present without evaluation and accreditation by Defendant-Appellant Middle States Association of Colleges and Secondary Schools, Inc.

Defendant is a nonprofit educational organization incorporated under the New York Education law in 1966. Its predecessor, an unincorporated association, had been in existence since 1886.

In June 1966 Webster sought equitable relief - and no damages - against defendant under Section 3 of the Sherman Act because defendant refused to consider plaintiff as eligible for evaluation and accreditation since the latter was not a nonprofit or public institution with a Board of Trustees representing the public interest. Plaintiff also claims that defendant's eligibility criteria were unjust, arbitrary, and unreasonable, and that plaintiff was entitled to equitable relief therefrom because of defendant's status as a quasi-governmental organization.

The Trial Court's decision was issued on July 23, 1969. Relief was granted to plaintiff on both counts.

The Trial Court found that higher education, including accreditation of institutions of higher education, is trade or commerce under Section 3 of the Sherman Act.

It held that no evil intent existed on the part of defendant, that defendant was formed with laudable purposes, and that defendant has "elevated the quality of education." Despite these findings, the activities of defendant itself constituted a combination, contract, and conspiracy in restraint of trade. Because defendant's members had a "special advantage" which deprived plaintiff of a "business service," a restraint under the Sherman Act was established.

Defendant's eligibility criteria were judged unreasonable because they did not further its own aim for improving higher education, which needed the benefit of commercial competition and the profit motive. ". . . Defendant's requirement that institutions of higher education be nonprofit organizations with a governing board representing the public interest . . . is arbitrary, unreasonable, and contrary to the public interest." (Opinion. Paragraphs 29-32, 43).

With regard to the second count, the Trial Court held that, while precedent in the field was limited, "fundamental fairness dictates that plaintiff is entitled to prevail on count two." (Opinion. Para. 41).

The Court concluded that the nonprofit standard is "arbitrary, discriminatory and unreasonable." (Opinion. Paragraphs 39-40).

ARGUMENT

INTRODUCTION

Western Association of Schools and Colleges (WASC) is one of the six regional accrediting associations referred to by name in the opinion of the District Court herein, and is a member of the Federation of Regional Accrediting Commissions of Higher Education.

WASC is not immediately concerned with "plaintiff's desire to obtain regional accreditation" for the reason that geographically plaintiff is without the area served by WASC.

WASC is vitally concerned, however, with the purported application of the Sherman Antitrust Act and the Clayton Act to defendant's activities, as well as the assertion that the accrediting function is so inherently governmental in nature that its actions are "state actions in a constitutional sense subject to the restraint of due process." (Opinion. Para. 9). WASC is concerned for the reason that is own purposes and activities are substantially similar to defendant's purposes and activities, except that WASC serves a different geographical area.

POSSIBLE CONSEQUENCES OF DISTRICT COURT'S RULING TO HIGHER EDUCATION IN THE UNITED STATES

If it has become the law that the Sherman Antitrust Act and the Clayton Act are applicable to higher education, it must inevitably follow that all of the associations presently engaged in the work of accreditation will find themselves exposed to serious legal entanglements. The present case relates only to plaintiff's "desire to obtain regional accreditation."

What of the future when a school or college which has been given regional accreditation, and accreditation is later taken away? Such cases are, for example, Parsons College vs. North Central Ass'n of Colleges and Secondary Schools 271F. Supp 65, (N.D. Ill), (1967), and North Dakota vs. North Central Ass'n of Colleges and Secondary Schools 23 F Supp 694 (E.D. Ill.) aff'd 99 F2d 697 (7th Cir. 1938). Both cases involved only an attempt by the school to regain accreditation which had been taken away. The right of a student at such a school, who finds that he is damaged by the fact that his school has had its accreditation taken away has not been passed upon. "Harm to the student is likely, since many states will not license persons to practice in certain professions unless they have graduated from accredited schools." Kaplin and Hunter "The Legal Status of the Educational Accrediting Agency, etc." 52 Cornell Law Quarterly 104, 111 n54. It is not difficult to envision the harrassment to which accrediting organizations would be exposed at the hands of disgruntled students.

If the Sherman Antitrust Act and the Clayton Act apply, it would make little difference whether a school organized for profit is accredited or not, as a result of this action. The consequences would remain the same. If the decision of the District Court is allowed to stand, accrediting organizations would be vulnerable to suits for treble damages by students to a point where it might be folly to continue their existence.

THE SHERMAN ANTITRUST ACT AND THE CLAYTON ACT DO NOT APPLY TO HIGHER EDUCATION

Neither the Sherman Antitrust Act nor the Clayton Act should be extended to areas not intended by Congress. The areas in which Congress intended these acts to apply are crystal clear: these are "business competition," Apex Hosiery Co. vs. Leader 310 US 469; combinations "having commercial objectives," Klor's Inc. v Broadway-Hale Stores 359 US 207; areas not included are "political activity," Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 US 127, "the liberal arts" or "learned professions," The Nymph CC 1 Sumn. 516, 18 Fed Cas 506 (No. 10388 1834) quoted, with approval, in Atlantic Cleaners & Dyers Inc. v. United States 286 US 427, 436.

The District Court in the present case realized the novelty of the attempt to apply the Sherman Act. In its opinion at page 11, it is said:

> "A new and pivotal question here for determination is the applicability of the antitrust laws to the field of education. Is higher education, including the accreditation of institutions, trade or commerce and thus within the regulatory scope of the Sherman Act?" (Underscoring supplied.)

At page 13 the Court sought to answer this in the following language:

> "The myriad financial considerations involved in building programs, teachers' salaries, tuitions and miscellaneous operating expenses attest to the commercialism

which necessarily exists in the field of higher education. Despite the opposition of many educators, there has been a recent trend toward the organization of faculty members to bargain collectively for better salaries and other benefits. Many institutions rent dormitory rooms and operate dining halls, book stores, and other service facilities. Also there is a commercial aspect to the sharp competition for government and private contracts and the quest for research grants. In 1967-68 institutions of higher education expended more than 17 billion dollars. The projection for the year 1976-77 is 41 billion. Higher education in America today possesses many of the attributes of business. To hold otherwise would ignore the obvious and challenge reality."

To hold that mere incidentals are the defining characteristics of colleges and universities obscures the main purposes of institutions of higher education and mistakes the forest for the trees. "The myriad financial considerations" are necessary for the successful operation of most organizations, including churches. Actual and projected expenditures for higher education in the United States provide evidence of the implementation of the unique purposes of higher education rather than support for a relationship with trade or commerce.

CONGRESS RECOGNIZES THE LEGITIMACY OF ACCREDITING ASSOCIATIONS SUCH AS DEFENDANT

Congress has removed any doubt of its attitude concerning the legitimacy of associations engaged in higher education such as defendant and WASC by amending the Higher Education Act of

1965, P.L. 89-329 (Plaintiff's Exh. 123). In Section 1201 (j), the term "combination of institutions of higher education" is defined as:

> "a group of institutions of higher education that have entered into a cooperative arrangement for the purpose of carrying out a common objective, or a public or private nonprofit agency, organization, or institution designated or created by a group of institutions of higher education for the purpose of carrying out a common objective on their behalf."

As far as Congress is concerned, such a "combination of institutions of higher education" should be given favored treatment. There would be no logical reason to recognize the necessity and desirability of such combinations and, at the same time, tie their hands by way of the antitrust laws.

THE REFUSAL OF DEFENDANT TO CONSIDER PLAINTIFF'S APPLICATION WAS AND IS THE ACT OF A PRIVATE ASSOCIATION. DUE PROCESS IS NOT APPLICABLE.

The assertion that defendant's accrediting function is so inherently governmental in nature that its actions are "state actions in a constitutional sense subject to the restraint of due process" lacks one essential ingredient: There must be some sovereign authority for whom defendant purports to act. Its acts under some circumstances then become the acts of the sovereign. It is a mere agent.

Here, however, there is no such sovereign whom defendant purports to represent. The District of Columbia through its Board of Education has already accredited plaintiff. Defendant, in refusing to do so, obviously cannot, and does not, speak for the District. Nor is Defendant acting for Congress. Congress has disclaimed any intention of regulating educational standards.

In the National Defense Education Act, 20 U.S.C. #401 and #402, this national policy is codified:

"The Congress reaffirms the principle and declares that the states and local communities have and must retain control over and primary responsibility for public education. . ." 20 USC 401

* * *

"Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system." 20 U.S.C. 402

The correct theory is discussed at length in Parsons College, Inc. v. North Central Association 271 F. Supp. 65 (N.D. Ill 1967). In that case, it is said:

"In attempting to make this requisite showing that the action of the Association was wrongful, the College has charged, first, that the procedures which led to the decision to discontinue accreditation operated to deny due process, and second, that the decision as a substantive matter was arbitrary in a number of respects. Invoking a claim of due process, the College draws no support from the commands of the federal Constitution, as contained in either the Fifth or Fourteenth Amendment. By their terms, these constitutional guarantees control only the action of government. Designed to guard the individual against the overweening power of the state, they do not control the voluntary arrangements or relations of private citizens in their private dealings with each other. Here there is no suggestion that the Association is an arm of

government, making its acts the action of the state. With a corporate charter granted under general law, the Association stands on the same footing as any private corporation organized for profit or not. The fact that the acts of the Association in granting or denying accreditation may have some effect under governmental programs of assistance to students or colleges does not subject it to the constitutional limits applicable to government, any more than a private employer whose decision to hire or fire may affect the employee's eligibility for governmental unemployment compensation. The termination of membership in a private association, organized to maintain the standards in a profession or calling, does not, therefore, present a federal question. See Rosee v. Board of Trade of City of Chicago, 311F. 2nd 524 (6th Cir. 1963). In a case involving an attack on the accreditation actions of this same Association, the court declared, 'It is vain to appeal to a constitutional bill of rights, for such bills are intended to protect the citizen against oppression by the government, not to afford protection against one's own agreements.' North Dakota v. North Central Association, 23 F. Supp. 694, 700 (E.D. Ill. 1938), affirmed, 99 F.2d 697 (7th Cir. 1938). The term 'due process' is thus something of a misnomer in this field."

It is clear that defendant's refusal to consider plaintiff's application was and is the act of a purely private association. There is no sovereign in the District of Columbia to which the blame, if any, can be attributed. Both Congress and the District

have made this clear. Absent this essential ingredient, plaintiff's contention must fail.

CONCLUSION

The judgment of the District Court should be overruled, and plaintiff's complaint should be dismissed.

Respectfully submitted,

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BRIEF OF APPELLEE
IN OPPOSITION TO BRIEFS *AMICUS CURIAE*

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,351

MARJORIE WEBSTER JUNIOR COLLEGE, INC.,
Appellee,

v.

MIDDLE STATES ASSOCIATION OF COLLEGES
AND SECONDARY SCHOOLS, INC.,
Appellant.

On Appeal from the United States District Court
for the District of Columbia

December 22, 1969

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Appellant.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLEE IN OPPOSITION TO BRIEFS *AMICUS CURIAE*

I. PRELIMINARY STATEMENT.

Eleven briefs *amicus curiae* have been filed in this case supporting Appellant's position. Most of the arguments in the *amici* are similar to those made by Middle States in its main brief[1] and are adequately discussed in our brief

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[1] Indeed, the brief of the Pennsylvania Association of Colleges and Universities appears to be a verbatim copy of the Middle States' argument concerning the antitrust count, modified by superficial editing and two minor additions.

in opposition to Middle States. Where further discussion would be repetitive, we have referred to the appropriate sections of our brief.

II. THE NEW ENGLAND ASSOCIATION.

A. Antitrust.

The brief of the New England Association of Colleges and Secondary Schools, Inc. (New England Association) adds nothing new to Middle States' arguments that higher education is immune to the Sherman Act. Although some different cases are cited, the thrust of the argument is the same. The argument never really comes to grips with the doctrine of the AMA cases, which hold that no person, however exalted his purpose, may unreasonably restrain the trade of another under the Sherman Act.

B. Constitution.

The New England Association purports to treat the constitutional question, but does not really deal with it. Instead, it inaccurately asserts that the District Court "relied upon" an editorial written by Dr. J. Herbert Hollomon, as "authority" for its conclusion that Middle States is performing state action in a constitutional sense. This is manifestly unfair to the District Court, which quoted the Hollomon statement only to illustrate the need for competitiveness and innovation in education that can be served by proprietaries. The court in no sense relied upon the Hollomon statement to support a finding of state action. Evidence of such state action was ample (Webster brief, pp. 9-13, 50-59), and fully justifies the court's conclusion that Middle States is subject to the restraints of the Constitution.

C. Reasonableness.

Finally, the New England Association asserts that Webster has failed to carry its burden of proof that the proprietary exclusion is unreasonable. This contention is unfounded.

First, Webster took every reason which Middle States had ever given for this exclusion and submitted it to rational scrutiny. None of these reasons withstood such scrutiny. Unbiased experts found the reasons unreasonable. (Webster brief, pp. 24-31).

Second, Webster offered factual evidence showing that on the basis of experience (a) the Western Association has continually accredited three proprietary institutions (using qualitative standards similar to Middle States'), (b) Middle States has routinely applied qualitative standards to accredit secondary schools, (c) the District of Columbia government accredits proprietary schools, and (d) the Congress of the United States, other accrediting agencies, and some institutions of higher education treat proprietary institutions without discrimination. (Webster brief, pp. 19-23).

Third, after Middle States closed its case, and after it had presumably elicited from its witnesses every reason why a proprietary school should be excluded, Webster proved that such conditions did not exist in its junior college. It established beyond question the existence of academic freedom and control of the curriculum by the faculty. (Webster brief, pp. 34-35). It showed that Webster's proprietary nature does not affect decisions in academic matters. (Block, J.A. 1541-1548).

III. THE WESTERN ASSOCIATION.

The Western Association of Schools and Colleges (Western Association) repeats Middle States' arguments, relying essentially on the same cases cited by Middle States.

Western's brief is significant, however, because of what it does not say. This is the same association which continues to evaluate and accredit three proprietary institutions of higher education in California (Webster brief, pp. 42-44). If any regional association is in a position, from concrete experience, to point out the operational differences in a proprietary that make it impossible to evaluate it with qualitative standards, as Middle States asserts, it is Western. Yet, its brief is silent on this matter. Perhaps it feels estopped by the testimony of its own Executive Secretary when questioned about evaluation procedures of the Western Association:

> "Q. Well, do you make this evaluation without reference to the fact that the institution is proprietary?
>
> "A. I don't see what that has to do with it." (Herrick Dep., J.A. 491).

IV. THE NORTHWEST ASSOCIATION.

The Northwest Association for Secondary and Higher Schools, Inc. (Northwest Association) argues that (1) there is an inherent conflict between proprietary operation and excellence, (2) evaluation and accreditation of proprietary institutions is impossible, and (3) the Sherman Act is not applicable to higher education. These arguments were raised by Middle States and have been considered in Webster's brief.

Northwest's assertion that the "scope and nature of [its] activities * * * do not include evaluation, accreditation and endorsement of profit making corporations engaged in higher education," (p. 5) implies that the association is entitled to be the sole arbiter of the scope of its membership. This flies in the face of the law set down by the New Jersey Supreme Court in *Falcone v. Middlesex County Medical Society*, 34 N. J. 582, 170 A.2d 791 (1961). When a private trade or professional association exercises virtual monopolistic control in a particular area in which the public has a vital interest, the association's power to determine the scope of its membership must yield

to the controlling policy consideration of the individual's opportunity of earning a living and serving society in his trade or profession. According to *Falcone*, the monopoly power must be such as to preclude an excluded person from successfully continuing his practice and to restrict patrons, who wish to engage him, in their freedom of choice of practitioners. The *Falcone* principles govern in the Webster case, for Middle States has monopoly control over total institutional accreditation of liberal arts-based colleges in its area with power to preclude Webster from successfully continuing to operate as well as power to restrict students, who wish to matriculate there, in their freedom of choice of junior colleges. Furthermore, Webster's ability to serve the best interests of its students by offering them a broad range of transfer possibilities and eligibility for government loans and scholarships is severely restricted. The strong public interest in accreditation is evidenced by public need for some expert body to identify institutions of quality and public reliance on Middle States to perform this function. This reliance is a product of Middle States holding itself out as a guarantor of institutional excellence and the recognition accorded it by the U. S. Office of Education as a reliable authority as to the quality of education offered by institutions in its area.

V. THE SOUTHERN ASSOCIATION.

A. Antitrust.

The Southern Association of Colleges and Schools, Inc. (Southern Association) concentrates its argument on the antitrust laws. This brief is particularly refreshing, since it admits a critical fact which Middle States has refused to concede, that is "[i]n fact, the lower court never decided that Middle States or its member-institutions were engaged in trade or commerce." (p. 25). It correctly recognizes that in an antitrust case, it is immaterial whether the defendant is engaged in commerce as long as the plaintiff is engaged in commerce.

Having made this admission, the Southern Association attempts to show that Webster is not engaged in commerce on the authority of *Marston v. Ann Arbor Property Managers Association*, ___ F. Supp. ___, 1969 Trade Cases para. 72862 (E.D. Mich., 1969). That case held only that students at the University of Michigan were not part of interstate commerce. Webster has never claimed that its students are in interstate commerce. It claims only, and incontrovertibly, that its activities as a corporation in operating Marjorie Webster Junior College constitute trade and commerce in the District of Columbia under Section 3 of the Sherman Act.

The Southern Association also seems to misconceive the nature of the restraint in this case. It asserts that the restraint of Webster's trade is the effect of lack of accreditation upon the movement of students (p. 24). This is not accurate. The restraint is the denial of accreditation. The effect upon transfer of Webster's students is a consequence of that restraint, which in turn inhibits guidance counsellors from recommending Webster.

B. Reasonableness.

The Southern Association discusses the question of reasonableness solely in an antitrust context. Emphasis is placed upon reasonableness only as it affects *competition* among institutions of higher education. Webster has dealt with this question in its brief (p. 49) and need not repeat its argument here.

However, Southern's discussion of the test of reasonableness in an antitrust context must not be allowed to obscure the fact that the test of reasonableness under the common law and under the Constitution is somewhat different. In evaluating reasonableness under the due process clause of the Constitution and under the common law, the question of competitive effect is quite unimportant. Thus, when action is taken subject to the restraints of constitutional due process, it must be rationally and substantially related to the legitimate object sought to be attained. *Lapides v. Clark*, 85 U.S. App.

D. C. 101, 102, 176 F.2d 619 (1949); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *McGowan v. Maryland*, 366 U.S. 420 (1961). In addition, a higher standard is imposed by the Constitution. When state action is involved, the property right to operate an educational institution may not be impaired absent evidence that a school has failed to discharge its obligations to patrons, students and the state. *Pierce v. Society of Sisters of Holy Names*, 268 U.S. 510, 534-535 (1925). And a governmental classification which discriminates against exercise of this constitutional right must be necessary to promote a *compelling* governmental interest. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

Similarly, the test of reasonableness under the common law has little to do with competition. Public policy becomes a dominant factor. *Falcone v. Middlesex County Medical Society*, 34 N. J. 582, 170 A.2d 791, 799 (1961). Public policy in the District of Columbia is demonstrated by the fact that Webster has been licensed and accredited to operate a junior college and to confer degrees for over 20 years.

An act which is reasonable under the antitrust laws is not necessarily reasonable when state action is involved or when public policy is involved.

VI. THE NORTH CENTRAL ASSOCIATION.

The North Central Association of Colleges and Secondary Schools (North Central Association), in its brief submission, has concerned itself solely with the antitrust aspects of the decision. The bulk of its argument parallels Middle States' argument. In addition, it argues that two cases decided by the United States Court of Appeals for the Eighth Circuit are directly contrary to the District Court opinion. *Riggall v. Washington County Medical Society*, 249 F.2d 266, cert. den., 355 U.S. 954 and *Elizabeth Hospital, Inc. v. Richardson*, 267 F.2d 167, cert. den., 361 U.S. 884.

The thrust of North Central's argument concerning these cases is that a plaintiff may not complain for private injury under the antitrust laws unless there has been an injury to the general public. North Central appears to have failed to recognize that the public is always injured in a case in which the trade of a plaintiff has been restrained. This is particularly true in a case of this nature in which the activity – higher education – is so closely affected with the public interest.

VII. THE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES IN NEW JERSEY.

The only matter not yet considered which is raised in this association's brief is its reliance upon *Kimberly School v. Town of Montclair*, 2 N. J. 28, 65 A.2d 500, 503 (1949), holding that nonprofit educational institutions in New Jersey are properly immune from taxation. Webster does not contest this proposition. However, the same policy considerations which justify immunity from taxation do not justify immunity from the antitrust laws. Many nonprofit tax exempt corporations, including the American Medical Association, have been held subject to the antitrust laws.

VIII. THE MARYLAND ASSOCIATION FOR HIGHER EDUCATION.

All points raised by this association have been raised by Middle States and answered in Webster's brief.

IX. THE PENNSYLVANIA ASSOCIATION OF COLLEGES AND UNIVERSITIES.

Webster has already commented upon the remarkable similarity between this *amicus* brief and that of Middle States. Except for parts III-A and III-C, it is a copy of the Middle States' brief with only superficial and insignificant editing. Those two additional portions concern issues which have already been fully briefed by the parties.

X. LEHIGH UNIVERSITY.

Lehigh University is the home of Dr. Glenn Christensen, who was President of Middle States during the trial of this case. The views expressed in its *amicus* brief are quite comparable to those which Dr. Christensen expressed in his testimony and which have been discussed in Webster's brief. These views are self-serving, conclusionary, and expressed without any citation to any authority. Any response, under the circumstances, would be superfluous.

XI. PACE COLLEGE.

The brief of Pace College relies upon three New York cases to establish the fact that the courts of New York State have made distinctions between nonprofit and proprietary colleges in their consideration of tax exempt status. Webster concedes that such distinctions have been made, but fails to see any relevance in this point.

Middle States' action in excluding proprietary institutions does not become reasonable simply because distinctions can be made between profit and nonprofit corporations. The exclusion is reasonable only if the distinction is based upon a factor related to Middle States' function. Its function is to identify institutions of quality. There is nothing in the record of this case to indicate that quality suffers in proprietary institutions.

XII. ASSOCIATION OF AMERICAN LAW SCHOOLS – AMERICAN BAR ASSOCIATION.

Conceding that "[h]igher education deserves no unique immunity from judicial review," the Association of American Law Schools ("AALS") and the American Bar Association ("ABA") contend that the District Court should not have considered the reasonableness of the nonprofit criterion because it should have deferred to the professional expertise of the accrediting association in adopting a standard for the governance of its field of activity.[2] In effect, they claim

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[2] The brief takes no position on the reasonableness of the proprietary exclusion.

the trial court has intruded into an area where it is not qualified to pass judgment. They acknowledge, however, that such special deference should be shown only to a standard "reasonably related to the effectuation of the commendable educational policies of the Association"[3] and that accreditation decisions should be set aside upon proof that they "were arrived at arbitrarily and without sufficient evidence to support them. . . ."[4] They then argue that the District Court improperly applied the above test in determining the validity of the proprietary rule.

First, it needs to be pointed out that this case is not the situation to which the AALS-ABA argument is directed. The matter under review here is not the substantive adequacy of reasons for an accreditation or disaccreditation, that is, the application of evaluation criteria to measure a school's quality where an evaluation of the school has been conducted. In such a case, the argument that the accrediting agency is exercising its special competence and should be shown deference has some weight. Here, the issue involves a criterion of eligibility for consideration for accreditation specifying the corporate form of the institution. Middle States has not shown any exercise of special expertise in adopting the nonprofit standard. No special expertise is involved where the accrediting agency seeks to dictate the corporate form of a school rather than its educational activities. Therefore, the "deference to professional expertise" argument is inapplicable because there has been no exercise of such expertise to which the court could defer.[5] The trial court rightly held that "[e]ducational excellence is determined not by the method of financing but by the quality of the program."[6]

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[3] *North Dakota v. North Central Association of Colleges and Secondary Schools* (7th Cir., 1938), 99 F.2d 697, 700.

[4] *Ibid.*

[5] Middle States admits that it has never evaluated a proprietary institution of higher education or made any study of the effect of for-profit corporate form on the quality of the program. For discussion of lack of empirical basis for proprietary exclusion, see Appellee's brief, pp. 16-19.

[6] Opinion, para. 30, FF 60.

The quotation from the Cornell Law Quarterly article in section IA of the AALS-ABA brief, claimed to be a summary of the case for "deference based upon professional expertise," is incomplete because it stops short of the authors' exposition of the jurisdictional test to be applied by the court. Immediately following the quoted portion, we find:

> "The acceptance of jurisdiction in exclusion cases, then, should depend upon a balancing of three factors: (1) the extent of the accrediting agency's monopoly power; (2) the degree to which that monopoly power is being abused; and (3) the extent to which the accrediting agency is relying on its special competence, *i.e.*, interpreting and enforcing its own standards. The stronger the reliance of society upon the standards of the agency, the greater is the harm the agency can impose upon an excluded school and the greater is the monopoly power of the agency. The less publicly-oriented are the actions and policies of the agency, the greater is the likelihood that the monopoly power is being abused. When the degree of power and extent of abuse become significant enough to outweigh the deference paid expertise, courts may justifiably intervene."[7]

Using this test, the facts of this case weigh heavily in favor of intervention. First, Middle States' monopoly power over regional accreditation in the District of Columbia and public reliance on it are abundantly clear in this record and need no elaboration. Webster's need for such accreditation to successfully continue its operation is equally clear. Second, Middle States has abused this power by excluding without evaluation an institution for a reason unrelated to its own stated objectives and purposes. Third, it has not demonstrated any reliance on its special competence in adopting and enforcing the exclusionary standard.

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7 "The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation," 52 Cornell L.Q. 104, 115 (1966).

The tenuousness of the "special deference" argument in this case is well stated by the Cornell authors' comment on the instant case:

> "* * * defendant seems to be relying on its special competence in refusing to accredit proprietary institutions. But it is interesting to note in this regard that defendant has not inspected plaintiff school and found that its quality does not meet the standards of the agency; rather, defendant has refused to accept plaintiff's application for evaluation and accreditation. Under these circumstances, an argument that defendant is relying on its own special competence might carry less weight than it would if defendant had actually inspected plaintiff school and found it to be of substandard quality."[8]

Applying the test of the scope of review suggested by the *North Dakota* case, it is clear that Judge Smith properly considered whether the nonprofit standard was reasonable for he concluded that it is not related to the "legitimate and announced purposes of Middle States and the Federation."[9] Furthermore, the second part of the *North Dakota* test was met because the District Court found that the standard is based on arbitrariness and lacks evidence to support it.[10]

The *Parsons College* case[11] does not support the standard of review urged by AALS-ABA. In that case, as in *North Dakota*, the Court was dealing with a question of intervening in a disaccreditation (expulsion) decision which would have required it to pass judgment on the substantive reasons for an unfavorable evaluation of the educational quality of the college under the evaluation criteria of the regional association. The court was being asked by the

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[8] *Ibid.*, p. 115, footnote 82.

[9] Opinion, para. 43.

[10] *Ibid.*, para. 30, 43.

[11] *Parsons College v. North Central Association of Colleges and Secondary Schools* (N.D. Ill., 1967), 271 F. Supp. 65.

school to plunge into the thicket of myriad qualitative judgments made by the association of the full range of the institution's educational activities.[12] In making such judgments, the association was relying on its expertise in an area where the court apparently felt ill-equipped to substitute its judgment. The distinction between that situation and the case *sub judice* is readily apparent as hereinbefore explained.

In claiming that courts have paid special deference to the competence of professional associations in setting standards, the AALS-ABA brief ignores the leading case of *Falcone v. Middlesex County Medical Society*, 34 N. J. 582, 170 A.2d 791 (1961).[13] In that case, a county medical society had excluded a doctor from membership by applying a policy which required four-years' attendance at an AMA-approved medical school. He was a duly licensed and duly registered physician in the State of New Jersey. Since hospitals in the area required that a doctor be a member of the society in order to use the hospitals, the refusal to admit him had serious adverse effects on the doctor's economic and professional status. In directing the society to admit him to membership, the court recognized the understandable reluctance of the courts to interfere with the internal affairs of membership associations, but noted that judicial intervention is justified in cases of this nature:

> We are here concerned with . . . an organization, membership in which may here . . . be viewed as 'an economic necessity;' in dealing with such an organization, the Court must be particularly alert to the need for truly protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity for earning a livelihood while not impairing the proper standards and objectives of the organization. (170 A.2d at 796-797).

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[12] "Its educational purposes and tasks, the availability of resources for carrying them out, the organization and administration of the college, the programs of instruction and curriculum, the faculty and its morale, student life, and student achievement." *Ibid.*, p. 67.

[13] Discussed at pp. 60-62, Appellee's brief.

The court observed that the common law moves persistently to satisfy the changing needs of the times. Courts develop their powers in the light of continued experience to guide its future course. Turning to the problem of exclusion, the court stated:

> When the courts originally declined to scrutinize admission practices of membership associations, they were dealing with social clubs, religious organizations and fraternal associations. Here the policies against judicial intervention were strong and there were no significant counter-vailing policies. When the courts were later called upon to deal with trade and professional associations exercising virtually monopolistic control, different factors were involved. The intimate personal relationships which pervaded the social, religious and fraternal organizations were hardly in evidence and the individual's opportunity of earning a livelihood and serving society in his chosen trade or profession appeared as the controlling policy consideration. Here there have been persuasive indications . . . that in a case presenting sufficiently compelling factual and policy considerations, judicial relief will be available to compel admission to membership. (170 A.2d at 799).

Reviewing the powers of the county medical society, the Court found that it had a virtual monopoly over the use of local hospital facilities and could foreclose a doctor's chances of success. Referring to this power, it said:

> Public policy strongly dictates that this power should not be unbridled but should be viewed judicially as a fiduciary power to be exercised in a reasonable and lawful manner for the advancement of the interests of the medical profession and the public generally. (170 A.2d at 799).

The court found that the public policy of the state was expressed in its unrestricted grant of a license to practice medicine and surgery. It also concluded that the plaintiff's exclusion bore "no relationship to the advancement of medical science or the elevation of professional standards." (170 A.2d at 800). It ordered that the doctor be admitted to membership.

The similarities between *Falcone* and the instant case are striking. The state has expressed its policy by issuing a license for the practice of medicine in one case and for operation of a junior college in the other. In both cases an association has acquired virtual monopolistic power to control the successful pursuit of the licensed function by exclusion from membership. Webster does not ask that the association be directed to admit it to membership. It asks only that the unreasonable exclusionary policy be declared void so that it may be considered on its merits as an educational institution.

Falcone, it should be noted, is not an isolated case removed from the mainstream of the law. In *Group Health Cooperative of Puget Sound v. King County Medical Society*, 39 Wash.2d 586, 237 P.2d 737 (1951), the County Medical Society was enjoined from excluding doctors from membership because they were practicing contract medicine as participants in a medical cooperative. In *James v. Marinship Corporation*, 25 Cal.2d 721, 155 P.2d 329 (1944), the court restrained interference with the employment of a black man who had been denied membership in a union with a closed shop agreement with his employer, on the theory that when a union acquires a monopoly of the supply of labor, it occupies a quasi-public position similar to that of a public service business. In *Hurwitz v. Directors Guild of America*, 364 F.2d 67 (2nd Cir., 1966), the court refused to distinguish between problems of expulsion and exclusion from a union, and directed that the union's requirement of a loyalty oath be set aside. Finally, in *Higgins v. American Society of Clinical Pathologists*, 51 N. J. 191, 238 A.2d 665 (1968), the Supreme Court of New Jersey held that an association of clinical pathologists must reinstate a qualified medical technologist in its registry, since the technologist had been licensed by the state, and since the association's registry had come to be recognized by leading medical groups as the authoritative qualifying body for medical technologists.

In the above-cited cases, the courts discounted the associations' special competence because their actions were contrary to the public interest. In

the instant case, even if Middle States has exercised any special expertise in adopting and enforcing the nonprofit standard, it is not entitled to deference because the standard is against the public interest. Middle States' fiduciary power has not been exercised in a reasonable and lawful manner.

In a gross distortion of the District Court's opinion, AALS-ABA claims that "the court held that rule [nonprofit standard] unreasonable because in some cases it might exclude profit-making institutions more 'efficient' than some non-profit schools that were accredited."[14] This statement takes no notice of the substantial basis for the finding of unreasonableness. The trial court found that the exclusionary criterion is not related to the announced purposes of Middle States, and is based on the unsupported and unwarranted assumption that the profit motive is inconsistent with quality, that the Western Association accredits three proprietary institutions of higher education and that Middle States itself accredits three proprietary secondary schools. Moreover, the AALS-ABA brief makes the fundamental error of assuming that Judge Smith used the word "efficient" in its technological sense, entirely apart from substantive educational goals. Their misunderstanding is evident from their use of the terms "efficiency *per se*" and "pure efficiency." Read in context, it is clear that Judge Smith meant "economic efficiency," that is, efficiency in the achievement of educational objectives.[15] The AALS-ABA brief attributes to the District Judge a simple-minded belief that mechanical efficiency is a desirable characteristic of an educational institution rather than economic efficiency measured in terms of the quality or value of educational output per dollar's worth of resource input.

The attempt to analogize the exclusion of profit-making colleges to a labor union's inherent right to exclude foremen or supervisors fails due to a faulty premise. Nonprofit corporate form is not an inherent attribute of

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14 AALS-ABA brief, sec. IA.

15 "[A]n efficiently operated proprietary institution could furnish an excellent educational curriculum whereas a badly-managed nonprofit corporation might fail." Opinion, para. 30.

higher education. The fact that it is predominant does not make it so. Indeed, this predominance is a result of the exclusionary standards of Middle States and other regionals, rather than an intrinsic element of the operation of higher educational institutions. The proprietary school is more comparable to the black laborer excluded from a labor union than it is to the foreman or supervisor. The black man performs the same task with the same capabilities as the white laborer – the only difference being the color of his skin. The proprietary college performs the same educational function as the non-profit school – the only difference being its profit-making nature.[16] The qualifications of the laborer to do his job and of the proprietary to educate its students are the essential factor and the only one that should be taken into consideration by the association to which each seeks admission.

Respectfully submitted,

C. WILLIAM TAYLER
839 – 17th Street, N. W.
Washington, D. C. 20006

EDWIN R. SCHNEIDER, JR.
1522 K Street, N. W.
Washington, D. C. 20005

December 22, 1969

Attorneys for Appellee

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[16] Dr. Lindley Stiles, Professor of Education at Northwestern University and former Dean of the School of Education at the University of Virginia and at the University of Wisconsin testified:

> "Well, first of all, from my experience, when you look at a profit making institution and a non-profit institution, and judge them in terms of their purposes, which are to educate, their organization, their program, their resources, and their outcomes, which are the criteria that the Middle States Association uses to judge institutions, and when I look at the two types of institutions, I find not a great deal of difference at all.
>
> In fact, if I weren't told which the profit making institution was and which was not the profit making institution, I think I could not tell them apart." Tr. 6399.

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED
AUG 21 1969
CLERK OF THE UNITED
STATES COURT OF APPEALS

MARJORIE WEBSTER JUNIOR COLLEGE, INC.,)
)
Plaintiff-Appellee,)
)
vs.) No. 23351
)
MIDDLE STATES ASSOCIATION OF COLLEGES)
AND SECONDARY SCHOOLS, INC.,)
)
Defendant-Appellant.)

Exhibits To
Appellant's Reply to Appellee's Opposition to Appellant's
Motion for Stay of Injunction Pending Appeal

Charles S. Rhyne
Courts Oulahan
Benjamin P. Lamberton, III
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August 21, 1969

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EXHIBIT 1

MARJORIE WEBSTER JUNIOR COLLEGE

LIBERAL ARTS • SECRETARIAL • MERCHANDISING • SPEECH & DRAMA — PHYSICAL EDUCATION • FINE & COMMERCIAL ARTS • KINDERGARTEN

KALMIA ROAD & SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20012
TUCKERMAN 2-4400

RECEIVED
AUG 2? 1969
CLERK OF THE UNITED STATES COURT OF APPEALS

August 18, 1969

Middle States Association of Colleges
and Secondary Schools, Inc.
225 Broadway
New York, New York 10007

Attention: F. Taylor Jones, Executive Secretary

Gentlemen:

The Board of Directors of Marjorie Webster Junior College, Washington, D. C., has authorized me to represent the College in its request for a listing as an Applicant to the Commission on Institutions of Higher Education.

The College desires to initiate the proper process as an Applicant with the intention of undertaking all procedures necessary for accreditation by the Middle States Association.

Would you please indicate what steps are necessary to facilitate our acquiring Applicant status in your Association?

Sincerely,

Joyce J. Block

(Mrs.) Joyce J. Block
Chairman
Special Administrative Committee
Marjorie Webster Junior College

JJB:mjm

EXHIBIT 2

BOSTON NEW YORK MONTCLAIR PROVIDENCE

Katharine Gibbs School
Incorporated
200 Park Avenue, New York, New York 10017

RECEIVED
AUG 22 1969
CLERK OF THE UNITED STATES COURT OF APPEALS

August 8, 1969

Gentlemen:

Would you kindly send me information on the procedures for application for accreditation by your organization. I should also appreciate receiving a copy of your publication, Middle States Membership and Initial Accreditation.

Very sincerely yours,

Edna Woodhouse Dennis

Mrs. Charles C. Dennis
Director

Middle States Association
of Colleges and Secondary Schools
225 Broadway
New York, New York 10007

EXHIBIT 3

A I am not reading my answer. I have no answer to read.

Q You may proceed.

A The means then, having studied the goal as defined by the institution, Middle States Association looks at the means whih the institution is employing to make that goal more than an abstraction.

Among the means, which it considers essential,are the nonprofit status and the Board of Trustees representing the public interest.

It then having presupposed those means, looks at what the institution is doing to make it what it says it aims to be.

Its role then is to encourage the institution to employ the means it is employing more fruitfully and from time to time, to inaugurate other ways in which the goal may be achieved.

The Middle States evaluating teams, therefore, does not look on an educational operation. Instead it looks at an educational institution, and so that the members of the teams

on which I have served and one team which I have chaired, are told by the chairman frequently, although not always, that the total institution is the responsibility of each member of the team, and each member coming from a different institution with different work at that institution brings his knowledge to the task of evaluation which is extrenely specific in one area, for instance, the library,which is an obvious example, but he is asked to look at the library not in isolation from the rest of the institution but in relationship to it.

It is my opinion that the team visiting an institution must look first, as I stated, at the goals, but then at the organization of the college or the university because that organization is what it is in order to achieve those goals and then as sound as it is, it is furthering the goals of the institution.

Therefore, this very complex institution which we speak of very simply as a college or a university has meaning only when looked at in its totality.

The students, the faculty, the board, the administration, I submit, in my opinion, have meaning only in their relationships one to the other.

Consequently when I speak, as I will for a few moments, about each of the organizational components, I will try to speak of them as they exist which as existing in a complicated organization, and so complicated that I think of it as similar to an organism rather than an operation, an organism in which each part works for the attainment of the whole.

I prefer to begin to look at the organization of the college or the university with the students because the students are the reason for the being of the educational program for which the institution exists.

That institution, again, is only a means to that end.

In this complex organization at every level there is decision making and at every level there is a policy making role.

The students through their student government have a role in determining the policy of the college.

Their role has not anything to do with or very little to do with anything beyond student life, but they are interested in and we learn from them about areas in the college beyond

student life, but that is the area for which they have most responsibility.

The faculty are the decision making body in the non-profit institution of higher education.

Their role is the determination of the academic policy of the college primarily and yet they have a role in the overall policy of the institution, demonstrated, for example, at my institution by the fact that a faculty member sits on the Budget Committee of the college.

The administration has the role of executing the policy of the Board, but executing it in such a way that each other component in the college play their role so that the administration of the college really must act as the leader rather than anything else vis-a-vis the faculty.

The Board of Trustees in the organization has as its only responsibility the making of the educational process a better one.

The Board members come to the board to act in the public interest.

They are there to see that the quality of education is as superior as the college in question is capable

of making it.

Therefore, their role becomes very important because it is up to this board to see that the total resources of the college, resources in personnel, the resources in students, the financial resources of the college have one sole purpose which is the academic endeavor.

I look and again, this is my opinion, on education primarily as a process. It is not something which we at the college have to give to the students who come to enroll in our institutions.

It is something which the entire institution goes about together.

E ducation at a college or university, I submit, is a process which takes place through the inter-action of the various groups, trustees, administration, faculty and students, inter-acting one with the other and in my opinion that is another way of saying educating one another.

Educating one another, therefore, by shared decision making, by shared authority which presupposes only one fact, that each group has the same purpose in this inter-action and there are and I would hope always will be, tensions both with

the groups and between the groups, but these tensions would have to do with means and never with the end about which the entire academic community is in agreement, a quality education.

Q Thank you, Sister.

I would like to ask you a number more detailed questions, if I may.

Sister, you are aware, are you not, that the MSA eligibility requirements are at issue in this case and requires an institution to be nonprofit with a governing board representing the public interest.

What is your understanding of the term public interest?

A My understanding of the term public interest is that the college and particularly its board which represents that public interest has society as a whole as its-- that to which it directs its efforts.

The educational enterprise, therefore, becomes one for the good of the whole of society rather than for any segment of society, and this is true no matter what segment of society the students in a given institution come-because the education of any student profits the whole of society.

accrediting teacher colleges came before the Association and that was stated as a flat prohibition -- well, not stated as a prohibition, but stated as a definition, really, that all eligible teacher's colleges must be properly organized and so forth and colleges with non-profit boards of trustees, either public or non-profit boards of trustees.

There was no further action, necessarily taken, I believe until 1951 7 when a committee under Mr. Meder, which has been fully explored here, made this report and it was endorsed by the Association and the non-profit requirement has been carried in every announcement so far as I know, in one language or another, since, well, really, since 1936 when that decision was made.

Q Now, Mr. Jones, you have spoken of this review in 1957 which Dean Meder headed up.

A Yes.

Q At that time, did you support the non-profit standard?

A Yes, indeed.

Q And what were your reasons?

A As I have said, in the end of this morning's testimony, I have been for 40 years, closely and deeply involved in higher education, 20 of them teaching and 20 of them with

the larger relationships of the Middle States Commission.

I have discovered in that time with the Middle States Association, that the Middle States Association has only one purpose, as you know, to increase the effectiveness of institutions of education, and the Commission has only one responsibility, and that is to find out how to do that.

The Middle States Commission, therefore, is required, as I see it, to find out what are the things which help institutions gain quality, and to discovery the things which impede institutions in their search for quality in order to promote the one, and to help institutions cure or overcome the latter.

The Commission discovered 40 years ago that in its view the commercial pattern of organization was not conducive to the best kind of work in higher education, as they understood it, and as they wanted to have it since, as early as 40 years ago they were, the Commission was, advising institutions of a proprietary nature which applied or showed interest in Middle States membership, to reconstitute themselves as a non-profit organization and a good many of them did so -- places like Bennett, Mt. Vernon, Pace, Ryder, Finch, and became members of the Association.

Now, why did the Commission 40 years ago find it

necessary to deny the proprietary institutions, and why does it still find it necessary to require a non-profit organization?

As I have observed it, it is because the Commission's obligation is to discover what are the qualities which help institutions become effective and promote them, and to observe the factors which make it more difficult for institutions to attain superiority in their work and to help institutions overcome them.

Now, for half a century the Commission has been doing that and working solely at that, but it became apparent, apparently it became apparent to those who earlier worked with the Association, and it certainly has become apparent to me in my work with the Association, in these last 16 years, that a complete and unconditional commitment to clear and cogent educational goals is the very heart of the necessary circumstances to make an institution, to give an institution, full room for development.

It has also become apparent that institutions which in any way have lacked that unqualified commitment to educational purposes are not able to attain the kind of quality that was and, of course, is the very essence of the matter, that a conflict of interest at the core is the one thing

which the Association or the Commission finds quite unacceptable and, because it knows that it is unacceptable, and unacceptably affects or limits the development of the institution, it insists that that impediment be removed.

Therefore, it seems only fair to the institution simply to announce it, in candor, ahead of time, that that will be one of the elements which the Commission will review.

Now, the Commission has, I might observe, no interest in making over the whole of American education in its own terms.

We are aware, we know perfectly well, that there are many other kinds of institutions which society needs and we are not attempting to apply this requirement to other than the very small minority of the total educational scene which Middle States Commission accredits, but, among those with which we do work, our Commission finds no room for any wilfull impediment.

Apart from the, from this general matter, in immediate terms, as I see it, probably the two things which are most important in institutional quality are institutional effectiveness in relation to the quality of its administrative leadership and the extent to which the institution understands and is able to make use of the full professional ability of its

faculty.

Now, the administrative educational leadership is primarily a president's function not only because it is within his constitutional power to be the one to focus the institution, but because he is the only one who stands at the center.

Time and time again, as I think of the history of our work, I see that the remedies for an ailing institution, a seriously ailing institution, is and has had to be a new president.

The kind of presidents that institutions need today, the liberal arts colleges and professional colleges have simply got to have today, are hard to find and hard to keep and probably the factor most important in finding and keeping and attracting them is the nature of the governing body.

The kind of presidents these colleges must have in order to be the kind of institutions that the late 20th century in America needs, these people have got to define the institution in their own persons.

Now, the proprietary configuration makes that more difficult.

A non-profit configuration by no means guarantees it, but it eliminates some of the hazards.

Faculties in vigorous colleges, faculties who are

really professionals, insist on having control of the educational process in their own hands.

Trustees in general give a general direction to the administrative aspect and bring coordination, the people who can operate the institution, but the body of professional faculty are the ones who must control and operate the educational process.

The kind of people the faculty needs today, whom the colleges need to have on their faculties today, are not interested in any other kind of arrangement and, indeed, they don't have to be.

The Middle States Commission finds it impossible to accredit institutions which lack every possible feature to invigorate, stimulate, make effective, that which is the central part of any college -- indeed, the one thing that one might say which is the college -- that is the faculty.

Now, we observe also that institutions, educational institutions, are deliberate in change. It does not always seem so when you suddenly read that Princeton is going to admit women, but the fact is of course that the deliberative labor through which a decision like that is made, and comes to birth, takes years.

The idea that a college can be owned by a man or a

company which can change its nature overnight, is utterly foreign to the academic community.

Now, theoretically, if such a place were accredited, its accreditation could be changed overnight.

That is not the way, however, the academic community chooses to work -- indeed, it is not the way an institution has to work or in which to respect due process.

I suppose it needs to be said finally, I know it needs to be said finally, that a vigorous college needs to be filled with tension.

People are, it has been said in a quip of professors, that they think differently. It is true that they do.

They are academicians because they are individualists, because they love argument -- can't resist an argument -- but argument and dissension within commitment are what keep the profession alive and keep an institution growing and developing.

Having a non-profit board of trustees does not guarantee that.

Having a non-profit board of trustees does not guarantee that an institution has any single characteristic of excellence in higher education, but it helps to reduce the hazards.

Now, why does the Middle States Commission still insist on the non-profit principle --

MR. TAYLER: Your Honor, the question was addressed to his reasons for supporting the proprietary exclusion in 1957 and I don't want to interrupt, but it seems to me that he is getting a little far afield from that.

THE COURT: I think the question has been answered.

If you could pick up from there, Mr. Lamberton.

MR. LAMBERTON: Yes, Your Honor -- I would be glad to go on.

BY MR. LAMBERTON:

Q Mr. Jones, had there been any changes in the educational world or in society which have caused you to change your views regarding a non-profit standard?

A No.

Q Mr. Jones, is this the view of the Commission today?

A Oh, indeed.

Q Mr. Jones, are you familiar with the relief requested in this case?

A Yes.

Q The relief requested by the plaintiff?

A Yes.

Q What damage, if any, would Middle States Association

(After Recess
3:00 p. m.)

JM/1

MR. TAYLER: I have no further questions, Your Honor.

THE COURT: All right.

Mr. Sweet is excused.

MR. LAMBERTON: Thank you, Your Honor.

Your Honor, may I have a moment?

THE COURT: Yes.

MR. LAMBERTON: The defendant would like to call Dean John C. Hoy to the stand.

Thereupon --

DEAN JOHN C. HOY

was called as a witness by and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAMBERTON:

Q Dean Hoy, would you please state your name for the record?

A John C. Hoy.

Q And what is your home address?

A R.F.D. 2, Killingworth, Connecticut.

Q And your business address?
A Wesleyan University, Middletown, Connecticut.
Q And what is your position at Wesleyan University?
A I am presently Dean for Special Academic Affairs.
Q For how long have you held that position?
A I have held that position for one year.
Q And what position did you hold before that?
A Dean of Admissions and Freshmen at Wesleyan University.
Q Now, Dean Hoy, could you briefly describe your post secondary education?
A Yes.
I graduated from Wesleyan University in 1955 with a Bachelor's Degree, Major in History.
I took a Master's Degree from Wesleyan University in 1960 in American Civilization.
I did post graduate work at the University of Chicago and the University of Pennsylvania.
Q Do you hold a doctor's degree?
A I do not.
Q Now, could you briefly describe the positions

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Q Do you recall the question, Dean Hoy?

A Yes, I do.

Q Do you have an opinion?

A I think it is certainly possible that regional accreditation or the lack of it would affect the decisions of admissions officers. I think a prior point is the fact that reputation, in a sense, is a reflection of performance. And if this institution has been in existence since 1920 it does have a reputation, and I think it has, undoubtedly, seen a great many students transfer on to a number of institutions.

Some of the students, obviously, would have done well, others middling, and some perhaps not well at all. I think that typically colleges tend to keep records of the performance of their candidates. Wesleyan does, Swarthmore does and Lake Forest does. I think most institutions do.

In the last ten years I think Colleges, with the press of numbers of candidates applying, have tended to keep better records and have tended, I think, to be able to make a case for the quality of the schools that they deal with and, further, in a sense, to match candidates to their

own academic program for better overall performance.

In terms of making an assessment on the hypothetical case, I think it would be absolutely necessary to sit down with the data on all of the candidates who had been turned down by the institutions and a profile of the levels of qualification of those institutions in order to make any judgment at all.

Q Dean Hoy, just to clarify, are you referring to the 35 institutions which refused to accept transfer credits in the hypothetical?

A Yes. Or whatever number might have been turned down in any given year of those candidates who applied.

I think it is also important to keep in mind that institutions have levels of selectivity. The hypothetical college might have a higher level of selectivity, for example, than an accredited public institution. It might have a lower level of selectivity than another two-year women's junior college.

And levels of selectivity certainly determine the qualities of candidates as they graduate and as they apply to seek entrance for transfer. And in this process a

great many rejections take place.

Over the decades that I admitted freshman classes and transfer students I think I admitted somewhere in the neighborhood of I would say 1200 students -- more than that -- but probably rejected five times that many. And there were all sorts of reason as to why you would turn down a candidate.

And I would presume that perhaps one of the reasons that a college admissions officer might cite, though it might, in fact, not be the case, the matter of regional accreditation. I myself have never used that as a reason for turning anyone down.

Q I wonder if you would prescribe the admissions procedure at Wesleyan University?

A Well, they are very complicated. Candidates typically will file a preliminary application. In our institution they will not file a formal application until the fall of their senior year. At that time they are required to submit test results, a transcript of their total secondary school records, teacher references and an autobiographical statement and come in for an interview and a second interview

with an alumnus and complete a personnel form with a a great many questions on it.

The form that we use does not have any question whatsoever about the accreditation of the secondary school or collegiate institution from which the candidate is transferring.

MR. SCHNEIDER: If I may interrupt a moment. Is this question directed to the admission of freshmen or transfer? It seemed to me we were dealing just with freshmen and I would just like to know the witness' understanding.

MR. LAMBERTON: I think the witness is now speaking of the admission of freshmen.

Is that correct?

THE WITNESS: Yes. Although it isn't that different a procedure for the admission of transfers, except that you do ask for the college records plus some additional examinations from time to time.

MR. SCHNEIDER: Pardon my interruption.

BY MR. LAMBERTON:

Q Dean Hoy, in answering these questions you might answer them in terms of the general picture except

insofar as it differs for transfers and for freshmen; and there you might note what differences there are.

A Let me add here that with respect to transfer students that they complete essentially the same forms, resubmit their secondary school records, their secondary school testing program, and might add to this the examination for the college entrance examination board, any advanced courses they might have had, and add to it letters of reference from teachers that they have had at college level.

There is for both the freshman candidate and the transfer candidate an official form that comes from the school, and this is generally the recommendation of the guidance councilor or the principal,in the case of the transfer student the dean of the college or the dean of students.

Would you like me to get into what we do with this information?

Q If you could, describe just briefly the factors that are taken into account by you and your staff for the admissions committees making the decisions on the applicants.

A I think most of the admissions officers would

agree that previous academic performance is the best harbinger of extended academic performance. Although we do rely rather heavily on high school records and on objective testing.

As the various pieces of information are put together -- We have a particular format for that. And with the staff or an admissions committee of five, three men on the admissions committee must read everything in a folder prior to the presentation of that folder for a decision. One of the men on the committee of five who has read the folder is the advocate of the candidate and presents the case, which is then discussed by the members of the committee. The emphasis in this process is very much on the individual involved, not just on his board scores or his previous academic record or the school that he came from, or who his father is or what he wants to do with his life. It is rather a composite of all these things.

And the committee actually votes as to who will be admitted and who will be turned down. It is seldom that simple. It tends to be a boiling-down process where you put people in a definitely yes category, a maybe category and probably no category; and then go back again at

a later time and the class begins to take shape.

Q Now, at Wesleyan to what extent, if at all, does the accreditation of the high school affect your decision as to an applicant?

A It does not affect the decision whatsoever in that we seldom know this information. The information would only be inadvertent, so that it does not affect the admission of a candidate, nor would it affect the admission of a transfer candidate.

Q Now, you mentioned a number of factors which are taken into account and -- just to clarify the record -- these factors are the same for transfer students as they are for the admission of freshmen; is that correct?

A Yes. I do think that you would add the possibility that a transfer student were a bit more mature intellectualy and had a stronger sense of the program he or she wished to pursue. There is a little more definiteness here than might be the case with a rising senior in high school. But essentially the same criteria prevails.

Q Now, again with reference to Wesleyan, in determining how many credits to grant a student coming in, to

what extent, if any, does the regional accreditation of the institution from which the applicant is coming affect your decision?

A In our operation it does not affect the decision. As is stated in the Wesleyan catalog, we attempt to admit only transfers with B averages. Virtually all work of C and above is credited at Wesleyan and at Swarthmore and at Lake Forest.

If that work has its match in the Wesleyan catalog, not an identical course, but generally it is work which you would find in an art and science curriculum. For example, Wesleyan would not give credit for courses in pharmacy, engineering, social work, since we do not have programs in these areas. We have made exceptions, actually, in each of those areas to give credit but typically we don't.

Q At Wesleyan are there any particular programs to encourage transfer from two-year institutions?

A There are.

We have become concerned, as I think most four-year institutions have, with the enormous growth of the junior colleges in the United States. And I believe about 1910

whether we are dealing with a neighbor or whether we are dealing with California, or the region or the whole country makes an awful lot of difference.

MR. LAMBERTON: I think we are dealing with the reputation of a particular institution here, Your Honor, with regard to these three institutions he has been connected with.

THE COURT: Do you understand the question?

THE WITNESS: Yes, I do.

THE COURT: You may answer it.

THE WITNESS: I think any institution that might be in existence for forty years and had done business with Wesleyan in terms of the admission of students would certainly have a reputation and we would be aware of it. Certainly it does not take very long for an institution to have such a reputation.

The community colleges in the State of Connecticut, for example, already have a reputation on our campus; and I would certainly hope that in the hypothetical case that the institution would have a reputation that it would be proud of.

BY MR. LAMBERTON:

Q Now, in your opinion, would it be able to establish this reputation to which you have referred in spite of the fact that it was not accredited?

A Yes.

Q Now, Dean Hoy, to what extent, if at all, do institutions of higher education in rejecting students make reference to mechanical rules which are not, in fact, the sole reason for the rejection?

MR. SCHNEIDER: Your Honor, that is leading and --

THE COURT: The objection is sustained.

MR. SCHNEIDER: It is also asking something which I don't think is within his knowledge.

BY MR. LAMBERTON:

Q Limiting my question to the institutions which you have been connected, to what extent, if at all, are references made to standards in rejecting students which, in fact, do not reflect the entire story on that rejection?

MR. SCHNEIDER: Your Honor, I just think it is dragging the witness along. I realize leading questions are

sometimes asked when time is short.

THE COURT: The objection is overruled. He may answer that question if he understands it.

THE WITNESS: I think that the answer is a complicated one, and I will try to be brief.

I think that you say no to people more often than you say yes with respect to admitting students, whether they be high school or transfer students, and when this is so you have a problem on your hands. The people always want to know the reasons why they are turned down. In many instances, for example, colleges will say, your college board scores are too low. In fact, the college board scores may be lower than the median of the entering class at that college but, in fact, this may not be the reason the candidate has been turned down.

For example, the candidate might be the son of an alumnus and have low college board scores and very poor recommendations from his teachers and from his high school. We do not reveal the fact that the high school has given him a poor recommendation or that individual teachers have. I think that one of the things that colleges have

attempted to do over the last ten years is limit the kind of information that they give on the reasons why a man has been turned down or a woman has been turned down for admission.

BY MR. LAMBERTON:

Q Have you found in your experience that lack of regional accreditation might serve as such a reason?

MR. SCHNEIDER: Your Honor, this is absolutely leading.

THE COURT: Sustained.

MR. LAMBERTON: Your Honor, I don't want to take up any time, but could I clarify myself on the basis for your ruling?

THE COURT: You may proceed with the next question. You are asking questions of the witness, not of the Court. Proceed.

MR. LAMBERTON: Very well.

BY MR. LAMBERTON:

Q Dean Hoy, to what extent, if at all, in your experience has lack of regional accreditation been used as a basis for rejecting students in the manner you have

described?

MR. SCHNEIDER: It is just as leading, Your Honor.

THE COURT: The objection is sustained. I don't suppose there are objections on other grounds. You may rephrase the question, if you can.

BY MR. LAMBERTON:

Q In your experience, what other reasons -- Strike that.

Dean Hoy, you have mentioned this matter of college board scores. What other factors, if any, might be used in the way you described the use of college board scores criteria?

A I think a class rating might be used. I think the age of the candidate might be used. I think lack of regional accreditation might be used, though at our institution it has never been used nor has it ever entered into the consideration.

MR. SCHNEIDER: Your Honor, what concerns me so much about this response is a little while ago we got Mr. Hoy to limit his response to what his experience was in

EXHIBIT 6

Probably 800 to 1,000 colleges in the country which tells brief information about the type of program, the size of the college, where it's located, the Director of Admissions, what kind of education you can get there, if they want art, music emphasis, what that might be.

Q Does it mention the accreditation status of the college, regional accreditation status?

A Not to my knowledge.

Q Do you use Lovejoy's Directory?

A Yes, we do. That is another one.

Q Does that one mention the accreditation status?

A To tell you the truth, sir, I never looked at them for that reason. I looked at them for what other things they had rather than whether they were accredited or nonaccredited. I believe there is a book that tells whether or not colleges are accredited although I have not had any particular use for it.

Q Very well.

Do you, as a source of your information about colleges and universities, use the report of credit given as published by the American Association of Collegiate Registrars and Admissions Officers, commonly known as ACRAO?

A I know there is such a book but we don't use it.

Q Do you have such a book in your school in your office?

A No.

Q Or the offices of the other two people who do the counselling service?

A No, we do not.

Q Can you tell us approximately how many girls each year you discuss junior colleges with when you are giving them the counselling service?

A If we use our present senior class of 81, it would be my estimate that at least a quarter, possibly as many as 30 percent have been talked to about possibility of junior college.

Q Do you discuss any specific junior colleges with these girls?

A Yes, we do.

Q Have you ever had occasion to discuss Marjorie Webster Junior College with any of them?

A Yes.

Q Can you tell us approximately how many girls during your tenure as the Head Master of Hockaday that you have had occasion to discuss Marjorie Webster?

A Probably a dozen to 14.

Q What have you told them about Marjorie Webster Junior College?

A Based upon my knowledge of it, I told them that it was a good junior college, it had a number of different programs, some of which were terminal; some such as the Liberal Arts, which would permit them to transfer to, or make them eligible to transfer to higher education. And that, from my knowledge of the institution that it was one that I could recommend; I thought they should look into farther. This is both the parents and the students.

Q Now sir, you are located down in Dallas, Texas, at a considerable distance from Washington.

Can you tell us how it is that the subject of Marjorie Webster Junior College comes up in the course of these discussions that you had with students about that school?

A One reason that a girl may like to go to a junior college is that she may not be sure whether she wants terminal education or whether she wants to go on and get four year college and we have some girls who like to go "East" to college. They may want to go through the junior college approach in the North or East and then return to either a private or a State university in the Southwest.

Particularly in connection with the City of Washington,

I think there is a certain amount of attraction. I realize that there has been a little bubble once in a while in the city they do like the opportunities of going to the city, the cultural background, the types of programs that are here, in addition to the education given in the institutions.

Q What is the basis for your having made those recommendations to the students to go to Marjorie Webster.

MR. OULAHAN: Your Honor, I assume that means factual basis?

MR. TAYLER: That means factual basis.

THE WITNESS: The reason we have recommended this has been to try to fit the individual into the kind of a program where we thought she would be successful.

I personally don't think there is any magic way of treating all people in the same fashion, thus what I am saying is that we are trying to individualize each girl's college plans whereas it seem to be fitting that she go to, for example, a State university, fine. If it should be an independent four-year college, fine. Large, small, junior college. This is what we were trying to do in these cases.

BY MR. TAYLER:

Q Have you had occasion in the course of telling these girls about Marjorie Webster, to mention the quality of

EXHIBIT 7

A Where did you get those figures?

Q Let me show you this, sir, which you already referred to which has been stipulated to be defendant's Exhibit No. 107, Cass and Birnbaum's.

A Publication date, sir?

Q Yes. First edition, 1964.

A No, the most recent, sir.

Q This is the most recent that I have.

A What is the date on that, sir?

Q This is '64 edition.

A Well, the reason that I ask, sir, is because Ohio University, as you probably know, is going through a tremendous building program in the last two years, and as a result, and this is the type of information that I am saying I don't refer to, because they have taken students in the last year or two from us in the top half of our class.

It might not show in this book, but it is known by me through experience in dealing with that university.

Q Now, in recommending students to Marjorie

Webster, and counseling students to apply, you have to make some kind of evaluation of what these students will get out of Marjorie Webster, don't you, whether or not this student will fit Marjorie Webster?

A You mean subjective?

Q Yes.

A Yes, sir.

Q And you would not recommend a student for Marjorie Webster in your counseling unless you were sure that she would receive the kind of education which would help her?

A That is correct, sir.

Q And the kind of education which would help her would necessarily have to be a rather good education, wouldn't it?

A Yes, sir.

MR. OULAHAN: Nothing further, Your Honor.

THE COURT: Just a minute, Mr. Trotter.

REDIRECT EXAMINATION

BY MR. TAYLER:

Q Mr. Trotter, do you have any -- do you have in front of you Defendant's E hibit 158, the ASK Kit?

EXHIBIT 8

The Upper Darby Haverford High School in the Philadelphia area have a college night to which they invite students from the surrounding high schools.

We make this information available to our students as well.

We also encourage them to visit college campuses and allow the seniors and sometimes the juniors three days during the course of the year to visit college campuses, and see colleges in action.

Those, I would say, are the main activities.

Q In the last three years have any representatives from Marjorie Webster visited your high school?

A Not that I recall.

Q Have any graduates from Radnor High School ever attended Marjorie Webster?

A Oh, yes, every year. Practically every year we have some.

Last year and the year before I think there were four each. I think it is -- I think it averaged about four a year over the past five years.

This year -- this year, I think there have been a couple of students -- seniors admitted already. They go for

merchandising as I recall and some have gone for the two-year physical education program, and some for the secretarial course and I think one of last year's graduates is in the transfer program, I think.

Q Thank you.

MR. LAMBERTON: Nothing further, Your Honor.

CROSS-EXAMINATION

BY MR. TAYLER:

Q Miss Carter, you mentioned the fact that over the last five years you sent an average of four girls a year to Marjorie Webster?

A I think it was about four. Some years more than others.

Q And that they have gone to Marjorie Webster for merchandising, physical education and two-year course in secretarial?

A Yes, those are my recollections.

Q Do you keep yourself acquainted with the -- in a general way where your high school graduates go to college?

A No, I think because I came up through the rule of counsellor that I probably am more interested in that than many high school principals. However, I certainly don't have

ADMISSIONS OFFICE REPORT

July 1968

urce of Inquiries	No.	Yr.
rect	67	1779
mnae	1	37
lephone	-	-
.S. Advisors	2	65
Student	-	8
Magazines	137	1598
epresentatives	3	119
Total	210	3607
Total Prev. Yr.	240	3670

Magazines	No.	Yr.
C -		3
R -		5
G -	47	424
B -	1	48
V -	2	57
M -		
S -	86	991
E -	1	68
X -		
N -		
E -		
CS -		2
Total	137	1598
Total Prev. Yr.	140	1460

Year of Interest	No.	Yr.
Current	48	1648
Future	126	1140
No Year	36	819
Total	210	3607

Cards Rec'd

Follow-ups

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RESIDENT APPLICATIONS

	Prev. Yr.	This Yr.
Applications received for month	10	7
Applications received for year to date	656	552
Cancellations for month	13	20
Cancellations for year to date	182	129
Rejections for month	1	-
Rejections for year to date	62	31
Net resident applications for year.	412	392
Paid room reservations for new registrants for month	15	19
Paid room reservations for new registrants for year to date	299	294
Paid room reservations for re-registrants for month	104	65
Paid room reservations for re-registrants for year to date	162	160

AY APPLICATIONS

pplications received for month	6	4
pplications received for year to date	50	29
ancellations for year to date	4	7
ejections for year to date	7	1
Net day applications for year	39	21
Paid day reservations for new registrants for month	2	4
Paid day reservations for new registrants for year to date	27	21
Paid day re-registrants for month	11	10
Paid day re-registrants for year to date	13	15

SEQ. #14